



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

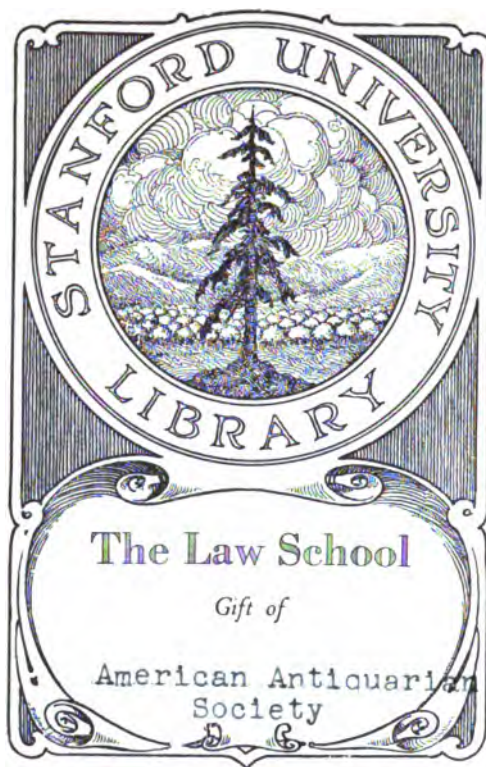
We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>





22

General Cash

S
BB
AK
JR

F. D. Lowell

Revised 4th Edition

THE

JUSTICE OF THE PEACE:

DESIGNED TO BE A

GUIDE TO JUSTICES OF THE PEACE,

FOR THE

STATE OF MAINE.

~~~~~

BY BENJAMIN KINGSBURY, JR.

~~~~~

PORTLAND:

PUBLISHED BY SANBORN & CARTER.

1852.

1

L11994

SEP 10 1936

Entered according to Act of Congress in the year 1851, by
BENJAMIN KINGSBURY, JR.,
in the Clerk's Office of the District Court of Maine.

VSANBL 0907M12

PREFACE.

THIS WORK is intended to be what the title page sets forth—a guide to Justices of the Peace for the State of Maine. Since, however, there is no part of the whole body of the law, to which a magistrate may not, in the exercise of the functions of his office, have occasion to refer, nothing short of a book embracing that whole system of law can be a perfect guide in all possible magisterial transactions. The limits of these sheets then, necessarily confine us to a somewhat outline view of the powers and duties of justices. For more detailed information upon the topics of which they treat, recourse must be had to “the Books” at large. We trust, however, that “The Justice of the Peace” will be found, for ordinary purposes, a safe, convenient, and sufficient guide to those for whose use it is more especially designed.

It is now ten years since the appearance of any publication of this description. The many important changes which have occurred in the statute law of the State during that time would have been of itself sufficient justification to the publishers for this issue.

A slight examination of our labors will, however, as we trust, show that these labors have had other purposes in view than such as have reference to recent legislation upon the matters here treated.

It may be noticed that we make no allusion to the militia law of the State. It seemed to us that, in the present state of the law and of public opinion upon that subject, justices would rarely, if ever, be called upon to administer what remains of what was the militia system in Maine. We have therefore preferred to occupy the room at our disposal with matter of mere evident practical value.

Our own experience has led us to the belief that justices are most frequently embarrassed by the want of appropriate forms of proceedings. We have, therefore, aimed to furnish as many forms as is consistent with the main design we have had in view.

The form we have adopted in the body of "The justice," for a complaint under the "Act for the suppression of drinking houses and tippling shops" has been approved by good authority. Some judicial rulings, made since these pages were put to press, have, however, induced us to add another in accordance with those rulings, which is deemed preferable. It will be found in an *addendum*.

We have, with the permission of the publisher, taken "The Massachusetts Justice" as our model. So far as the comparative condition of the law of this State and Massachusetts would permit, we have made the freest use of the matter of that excellent treatise; and indeed have not hesitated, in many cases, where the doctrine or form was applicable to our own practice, to adopt both the substance and language of what we there found.

The aim of the author has been to prepare a useful and valuable work, and not an original one. Indeed, the nature of the case hardly admits of any higher claim on his part, than to the faithful, patient, and careful labor of a compiler.

Portland, January 1, 1852.

CONTENTS.

OF THE JURISDICTION AND POWERS, APPOINTMENT AND TENURE OF OFFICE, OF JUSTICES OF THE PEACE.

PART I.

OF THE JURISDICTION AND POWERS OF JUSTICES OF THE PEACE IN CIVIL MATTERS.

CHAPTER I.

| | |
|--|----|
| Of Justices of the Peace as distinguished from Justices of the Peace and of the Quorum, - - - - - | 10 |
|--|----|

CHAPTER II.

| | |
|--|----|
| Of their Jurisdiction and authority, - - - - - | 11 |
| I. Of their Jurisdiction, generally, in Civil Actions..... | 12 |
| II. Of their Jurisdiction in Civil Proceedings specially given,..... | 12 |
| III. Of the General Powers and Duties of Justices of the Peace, other than those already enumerated,..... | 15 |
| IV. Of Municipal, Police and Town Courts, and how far the Civil Jurisdiction of Justices of the Peace is abridged thereby,... | 18 |
| V. Of a disqualifying interest,..... | 20 |

CHAPTER III.

| | |
|--|----|
| Of the Liabilities of Justices of the Peace, - - - - - | 21 |
|--|----|

CHAPTER IV.

| | |
|---|----|
| Of the Various Modes of Commencing Proceedings, - - - | 26 |
|---|----|

CHAPTER V.

| | |
|--|----|
| Of the Writ, - - - - - | 27 |
| I. Of the Form of the Writ,..... | 27 |
| II. Of the Direction,..... | 28 |
| III. Of the Date,..... | 29 |
| IV. When and where writs must be made returnable,..... | 30 |
| V. Of the Indorsement of Writs,..... | 32 |
| VI. Of the Parties,..... | 33 |
| VII. Of the Declaration,..... | 34 |

CHAPTER VI.

| | |
|--|----|
| Of the Service and return of the Writ, - - - - - | 35 |
| I. Of the Service,..... | 35 |
| II. Of the Return,..... | 40 |

CHAPTER VII.

| | |
|--|----|
| Of the Return Day of the Writ and Proceedings before Trial, | 41 |
| I. Entry, | 41 |
| II. Complaint for Costs, | 41 |
| III. Default, | 41 |
| IV. Absent Defendants, | 42 |
| V. Appearance, | 43 |
| VI. Pleadings and Motions to dismiss, | 43 |
| VII. Proceedings where title to Real Estate is in question, and in Replevin for beasts distrained or impounded where the damages demanded exceed twenty dollars, or the property in the beasts is in question, and their value exceeds that sum, | 44 |
| VIII. Amendment, | 46 |
| IX. Bills of Particulars, | 50 |
| X. Set-off, | 51 |
| XI. Offer to be defaulted, and Tender, | 54 |
| XII. Death, Marriage, &c. of a Party, | 56 |
| XIII. Bankruptcy, | 58 |
| XIV. Continuance, | 58 |

CHAPTER VIII.

| | |
|---|----|
| Of the Course of the Trial, and of Witnesses, - - - - - | 60 |
|---|----|

CHAPTER IX.

| | |
|--|----|
| Of the Judgment, - - - - - | 70 |
| I. Pleas in Abatement, and Motions to Dismiss, | 70 |
| II. Default, | 70 |
| III. Nonsuit, | 71 |
| IV. Trial, | 71 |
| V. Tender and offer to be defaulted | 71 |
| VI. In Other Matters, | 73 |

CHAPTER X.

| | |
|--|----|
| Of Appeal, Recognizance, Execution and Certiorari, - - - - | 76 |
| I. Appeal and Recognizance, | 76 |
| II. Of Execution, | 73 |
| III. Of Certiorari, | 81 |

CHAPTER XI.

| | |
|--|----|
| Of the Fees of the Justice, and of Costs in Civil Actions, - - | 83 |
| I. Fees of Justices of the peace, | 83 |
| II. Of the Taxation of Costs, | 83 |

CHAPTER XII.

| | |
|---|-----|
| Of Proceedings in Special Cases, - - - - - | 95 |
| I. Trustee Process, | 95 |
| II. Of Scire Facias, | 108 |
| III. Forcible entry and detainer, | 114 |
| IV. Replevin of Beasts and chattels, | 117 |
| V. Goods forfeited and lost Goods, | 118 |
| VI. Poor Debtors, | 120 |
| VII. Proceedings in cases of Insane Persons, &c. | 134 |
| VIII. Proceedings on Complaints for Bastardy, | 139 |
| IX. Proceedings in Penal Actions, | 142 |

CONTENTS.

vii

CHAPTER XIII.

| | |
|--|-----|
| Of Miscellaneous Proceedings, - - - - - | 143 |
| I. Depositions, | 150 |
| II. Of receiving the Acknowledgement of Deeds, and proving execution where a party refuses to Acknowledge,..... | 150 |
| III. Of reference of disputes, | 153 |
| IV. Recognizance for debt, | 154 |
| V. Of Watch and Ward, | 155 |
| VI. Demanding licenses of pedlars, | 156 |
| VII. Solemnizing Marriages, | 156 |
| VIII. Warrant for abating nuisances, | 159 |
| IX. Proceedings in cases of infection, | 160 |
| X. Proceedings in removing paupers, | 162 |
| XI. Of admitting persons to bail, | 163 |

PART II.

OF JUSTICES IN CRIMINAL MATTERS; THEIR POWER AND PROCEEDINGS.

CHAPTER I.

| | |
|---|-----|
| Their Jurisdiction and Authority, - - - - - | 165 |
| I. Final Jurisdiction, | 166 |
| II. Initial Jurisdiction,..... | 168 |
| III. How far abridged by Municipal, Police and Town Courts,.... | 169 |

CHAPTER II.

| | |
|---|-----|
| Of the Complaint and Warrant, - - - - - | 172 |
| I. Complaint, | 172 |
| II. Of the Warrant,..... | 178 |

CHAPTER III.

| | |
|---|-----|
| Of the Service and Return of the Warrant, - - - - - | 188 |
| I. Of the Service,..... | 188 |
| II. Of the Return,..... | 202 |

CHAPTER IV.

| | |
|---|-----|
| Arraignment, Pleadings, Trial, and Witnesses, - - - - - | 203 |
| I. The Arraignment, | 205 |
| II. The Pleadings,..... | 206 |
| III. The Nature and Admissibility of Evidence,..... | 210 |
| IV. Of the Trial,..... | 217 |

CHAPTER V.

| | |
|--|-----|
| Of Conviction, Sentence, Appeal, and Recognizance, - - - | 219 |
| I. Conviction,..... | 219 |
| II. Of the Sentence, | 220 |
| III. Of Appeals and Recognizances,..... | 230 |

CHAPTER VI.

| | |
|--|-----|
| Of Bail, and recognizing Witnesses, - - - - - | 235 |
| I. When and by whom Bail should be taken,..... | 235 |
| II. How Bail should be taken, and the amount to be required,.... | 240 |
| III. The disposition to be made of the Recognizance, after it is taken | 241 |

CHAPTER VII.

| | |
|---|-----|
| Of the Commitment, - - - - - | 243 |
| I. In what Cases a Commitment may be ordered,..... | 243 |
| II. To what place the Party shall be committed, | 243 |
| III. The Requisites of a Mitimus,..... | 244 |

CHAPTER VIII.

| | |
|--|-----|
| Of the Fees of the Justice, and Taxation of Costs, - - - - | 246 |
| I. Of the Fees of the Justice,..... | 246 |
| II. Of the Taxation of Costs,..... | 247 |

CHAPTER IX.

| | |
|---|-----|
| Of certifying Process, returning Recognizances, accounting for Costs, &c. - - - - - | 251 |
| I. Certifying Process and returning Recognizances,..... | 251 |
| II. Of accounting for Fines, Forfeitures, and Costs,..... | 252 |

PART III.

FORMS AND PRECEDENTS.

CHAPTER I.

| | |
|---------------------------------------|-----|
| Forms in Civil Proceedings, - - - - - | 253 |
|---------------------------------------|-----|

CHAPTER II.

| | |
|--|-----|
| Forms in Criminal Proceedings, - - - - - | 279 |
| I. General Forms,..... | 279 |
| II. Forms and precedents for complaints, &c. within the final jurisdiction of Justices,..... | 295 |
| III. Forms and precedents for complaints, &c. not within their final Jurisdiction,..... | 336 |

APPENDIX.

| | |
|--------------------------------|-----|
| Miscellaneous Forms, - - - - - | 369 |
|--------------------------------|-----|

ADDENDUM.

| | |
|---|-----|
| Additional form of complaint for keeping liquors with intent to sell, in violation of the Act of 1851,..... | 384 |
|---|-----|

PRELIMINARY REMARKS.

OF THE JURISDICTION AND POWERS, APPOINTMENT AND TENURE OF OFFICE OF JUSTICES OF THE PEACE.

THE jurisdiction and powers of justices of the peace are derived from statute provisions.¹ Their powers and duties, both in civil and criminal matters, are so particularly enumerated in our statutes, as to leave very little, if any, occasion for recurring to the ancient English statutes for guidance or information upon the subject; and perhaps the enumeration itself may be construed to preclude such recurrence for the purpose of inferring any power not enumerated.²

Justices of the peace are nominated, and, with the advice and consent of the Council, appointed by the governor of the State. Their tenure of office, like that of all judicial officers in the State, is seven years. They are subject, however, to removal by impeachment, or by address of the Legislature to the Executive.

Justices are not unfrequently appointed with powers extending "throughout the State," but ordinarily for some one county only.

The office of justice of the peace is incompatible with any office belonging to the executive department. Sheriffs, deputy sheriffs, constables and coroners cannot, for example, exercise the powers properly belonging to a justice of the peace.³

In the following pages we shall first speak of the civil jurisdiction of justices, and then, separately, of their criminal jurisdiction.

¹ 13 Maine, 23.

² 1 Mass., 488.

³ Const., act 3, sec. 2—ib. art. 4, sec. 11—7 Greenl. 14

PART I.

OF THE JURISDICTION AND POWERS OF JUSTICES OF THE PEACE IN CIVIL MATTERS.

CHAPTER I.

OF JUSTICES OF THE PEACE AS DISTINGUISHED FROM JUSTICES OF THE PEACE AND OF THE QUORUM.

THE word used to distinguish justices of the peace from such of them as are of the *quorum*, is taken from the commission issued in the mother country to certain magistrates eminent for their skill and discretion, one of whom [*unus quorum*] was required always to be present when certain matters were to be inquired into;¹ and justices of the quorum are under our statutes, invested with certain important powers denied to ordinary justices of the peace.

The examination of debtors under the laws for the relief of poor debtors, is had before justices of the peace and of the quorum.²

Any two justices of the peace and quorum have power to admit to bail persons committed, in certain cases.³

Important powers, in the commitment, and in the release from confinement, of insane persons, is given to justices of the peace and of the quorum, or to justices, one of whom shall be of the quorum.⁴

Depositions, in actions not pending, to perpetuate the testimony of witnesses, can be taken by justices of the peace and quorum only.⁵

Jurisdiction in cases of forcible entry and detainer is, with certain exceptions, given to justices of the peace and of the quorum.

It need hardly be added, that justices of the quorum are justices of the peace, to whom, by their commissions, certain special powers are given in addition to those of justices of the peace merely.

¹1 Black. Com. 351.

²R. S. 148, sec. 24.

³R. S. ch. 171, sec. 22—Stat. 1850, ch. 152.

⁴R. S. ch. 173—stat. of 1848, ch. 33—stat. of 1847, ch. 79.

⁵R. S. ch. 133, sec. 25.

CHAPTER II.

OF THEIR JURISDICTION AND AUTHORITY.

THE Constitution requires justices to qualify themselves by taking a prescribed oath or affirmation ; and it is unlawful for them to act as such without so doing. Their judicial acts, however, will not for this cause be invalid ;¹ it seems also, that a magistrate found acting as such will be presumed to have taken the requisite oaths.²

The powers of justice of the quorum have already, in a general manner, been spoken of, and will in a subsequent chapter be more particularly treated. We shall confine ourselves in this chapter to a general enumeration of the civil powers of justices of the peace.

The jurisdiction of a justice of the peace is confined to the county for which he is appointed ; but in all cases of scire facias against bail, or the endorsers of writs, or executors and administrators, and in all trustee processes, or original writs against two or more defendants, when a defendant or trustee resides out of the county where the proceedings are had, he may direct the writ or execution to any proper officer of the county where the defendant or trustee resides.³ The action must, however, in the last named cases, be brought in the county where one of the defendants, or one of the trustees resides. Personal property may also be attached on a writ against a single defendant or seized in execution against a single debtor, in any county in the state.⁴ And whenever any debtor, against whom judgment has been rendered, shall remove or be out of the county in which such judgment has been rendered, execution may be issued by the justice by whom the judgment was rendered, directed to the proper officers in any county.⁵

It is commonly said in the law books, that nothing is to be presumed in favor of the jurisdiction of inferior magistrates—a rule of some value in cases of doubtful jurisdiction.⁶

¹3 Barn. and Ald. Rep.

²4 Cranch. 180.

³R. S. ch. 116, sec. 17—ib. ch. 119, sec. 5—act of 1842, ch. 10, sec. 3.

⁴Act of 1842, ch. 10, sec. 1.

⁵Ib. sec. 2.

⁶18 Maine 340.

I. OF THEIR JURISDICTION, GENERALLY, IN CIVIL ACTIONS.

Every justice of the peace, excepting those residing in any city or town in which a municipal or police court is established, the judge of such court not being interested in the suit, has power to hold a court within his county, and has original and exclusive jurisdiction of all civil actions, wherein the debt or damages demanded (or, in replevin, the value of the property claimed) does not exceed twenty dollars, excepting real actions, actions of trespass on real estate, actions for disturbance of a right of way, or any other easement, and all other actions wherein the title to real estate, according to the pleadings, or the brief statement filed in the case by either party, may be in question; and in prosecutions for penalties, though his town may be interested in the penalty.¹

In the personal actions mentioned in the above exception, when the sum demanded does not exceed twenty dollars, justices have original jurisdiction, concurrently with the District Court.²

When it shall appear, in either of the ways before mentioned, or, in replevin for beasts distrained or impounded when it shall appear in any way, that the title to real estate is concerned or brought in question, the case shall, at the request of either party, be removed to the District Court. The proceedings to be had in removing an action in such case will be noticed hereafter.

Actions for injuries done to real estate may be brought before a justice of the peace in the county where a defendant resides, notwithstanding the general rule that such actions must be brought in the county within which the real estate lies, and if title to real estate is in question, may be removed to the District Court for the same county.³

II. OF THEIR JURISDICTION IN CIVIL PROCEEDINGS SPECIALLY GIVEN.

Justices of the peace, as well as judges of Municipal and Police Courts, have power to compel, by *capias*, the attendance of witnesses duly summoned to attend in matters depending before them; to fine them at their discretion a sum not exceeding twenty dollars; and to commit them till such fine, and costs of *capias* and commitment, are paid.⁴

¹R. S. ch. 116, sec. 1.

²Ib. sec. 2.

³10 Pick. 504.

⁴Stat. of 1847, sec. 1.

They have also power to compel them, by fine, to answer questions duly propounded to them, and to commit till fine and costs are paid.¹

Every justice of the peace may issue writs of scire facias against executors or administrators, upon a suggestion of waste, after judgment against them; and also against bail taken in any civil action, and against endorsers of writs; and may enter judgment and issue execution, as any court might do in like cases.² The nature and form of such writs are treated of in another part of this book.

In scire facias against bail, it is no bar to the process, that the debt and costs in the original judgment, when added together, exceed the sum of twenty dollars.³

When any justice of the peace shall die, after having given judgment in a cause, but before such judgment is satisfied, any other justice for the same county may, on complaint of the creditor, cause the record of such judgment to be brought before him, and it shall be transcribed upon his own book of records. Such transcription, duly proved, becomes legal evidence in all cases, where an authenticated copy of the original might be received. Such justice may also issue execution on such transcribed record, in the same manner, (changing the form, as the circumstances shall require,) as if the judgment had been rendered by himself; but no execution can issue, in such case, after the expiration of one year from the time it was rendered, unless after scire facias.⁴

Any person, in whose possession the record of such judgment may be, who shall contemptuously refuse to produce the same, or to be examined respecting it, on oath, being duly summoned for that purpose by a justice of the peace, may be committed to prison by such justice, as punishment for the contempt, to be detained until he shall submit to such examination, and produce the record.⁵

Every justice who may remove from the State, is required, before his removal, to deposit with the clerk of the courts in his county, all his records and papers, appertaining to his office, and is made liable to heavy penalties for neglecting so to do.⁶

Any justice, whose commission has expired, and shall not be renewed, is authorised to issue and renew executions on any judgment by him rendered while in commission; and also to certify copies of judgments

¹Stat. 1847, sec. 2.

²R. S. ch. 116, sec. 16.

³R. S. ch. 118, sec. 18.

⁴R. S. ch. 116, secs. 19, 20, 21, 22.

⁵Ib. sec. 19.

⁶Ib. sec. 23, 25.

rendered by him; but this power is limited to two years from the time his commission expires.¹

When any woman, being pregnant with a child, which, if born alive, may be a bastard, or who having been delivered of a bastard child, shall accuse any man of being the father thereof before any justice of the peace, and request a prosecution against the person accused, such justice shall take her examination, on oath, respecting the person accused, and the time and place, when and where the child was begotten, and all such other circumstances, as he may deem useful in the discovery of the truth; and the said justice may issue his warrant for the apprehension of such person, who, being brought before the justice issuing the warrant, or any other justice, may be required to give bond, with sureties, to the complainant, conditioned for his appearance at the next district court to be held in the county in which the complainant resides, and for abiding the order of the court thereon; and, refusing or neglecting to give such bond, shall be committed to the goal of the county of the justice, until such bond be given.²

When any personal property has been forfeited for any offence, and no special mode is prescribed for recovering the same, a libel may be filed, if the property does not exceed in value twenty dollars, before a justice of the peace of the county where the offence has been committed, and such justice shall try and decide the cause, and make such decree therein, as the law requires.³

When such property is seized, and persons claiming the same propose to give bond with a view, under the provisions of the statute, to have the same restored to them, the value is to be ascertained by appraisers appointed by a justice of the peace, if the parties cannot agree; and if no person claims the property so seized, appraisers may be appointed by a justice of the county, to ascertain the value of such property, which value shall be the rule for deciding, where the libel shall be filed.⁴

When the finder of lost goods, exceeding the value of ten dollars, would make legal disposition of them, he may procure from a justice a warrant, directed to proper persons, by whom such goods are to be appraised under oath. If after such proceedings are had, no owner

¹R. S. ch. 116, sec. 28.

²R. S. ch. 181.

³R. S. ch. 182, sec. 112.

⁴Ib. sec. 3, 4.

appear within one year, the goods, certain deductions being first made, belong to the finder. If the owner appear within one year, the goods, or their value, are to be restored to him, the finder being first allowed charges, and reasonable compensation, to be liquidated by some justice in the county, if the parties do not agree.¹

III. OF THE GENERAL POWERS AND DUTIES OF JUSTICES OF THE PEACE, OTHER THAN THOSE ALREADY ENUMERATED.

Every justice may adjourn his court, by proclamation, from time to time, as justice may require, and in case of inability of a justice to attend, the cause may be continued by another justice for the county.²

Justices of the peace may arrest any person disturbing them in the actual execution of their office; but the power to commit for contempt is incident to courts of record alone.³

No justice shall be of counsel for either party, or give advice to either party, in a suit before him.⁴

Every justice shall keep a fair record of his proceedings.⁵

Every justice of the peace may administer oaths in all cases in which an oath may be required, unless a different provision is made by law.⁶

Justices are held to render an account of, and pay over all fines and forfeitures, received by them upon convictions and sentences before them, whether accruing to the State or county, to the treasurer of the county, and if accruing to the town, to the treasurer of the town, within six months after receiving the same. In case of neglect, they forfeit double the amount, to be recovered by the treasurer of the county or town, as the case may be.⁷

Every justice of the peace may issue subpoenas for witnesses in civil actions, pending in the Supreme Judicial Court, District Court, or before County Commissioners, himself, or any other justice, referees, or auditors.⁸

Any justice may issue summonses for witnesses to appear before any Judicial Court, or before himself, or any other justice, in any criminal case, but not for witnesses on the part of the State, except to appear

¹R. S. secs. 15, 16, 17.

²R. S. ch. 116, secs. 13, 14.

³10 Johns., 398—21 Me., 550—4 Bl. Com. 284.

⁴R. S. ch. 116, sec. 15.

⁵R. S. ch. 116, sec. 19.

⁶R. S. ch. 179, sec. 12.

⁷R. S. ch. 152, secs. 20, 22.

⁸R. S. ch. 116, sec. 12—Ib. ch. 115, sec. 71.

before himself, without the consent of the attorney general or county attorney.¹

Upon complaint of the overseers of the poor of any town, any justice of the peace, not an inhabitant of their town, may, by warrant of removal, cause to be removed, any person actually chargeable, as a pauper, to the place where such person is found, but in which he has no lawful settlement, to the place of his lawful settlement, if he have any within this State.²

Upon complaint of said overseers, any justice may, by warrant, cause any pauper having no lawful settlement within the State, to be sent and conveyed, at the expense of the town, to any other State, or to any place beyond sea, where he belongs, if the justice thinks proper, if he may be conveniently removed; but if he cannot be so removed, he may be sent to, and relieved, and employed in the house of correction or work-house, at the expense of the town.³

Any justice of the peace may take depositions, to be used in any pending cause, he not being interested in such cause, nor being, nor having been, counsel or attorney in the same.⁴

Any justice of the peace may take the acknowledgment of deeds, to be made by the grantors, or by one of them, or by the attorney executing the same.⁵

When a grantor shall refuse to acknowledge his deed, upon application of the grantee or any person claiming under him, any justice of the peace of the county where the land lies, or where the grantor resides, may summon the grantor to appear before him, and it being made to appear by the testimony of the subscribing witness, that he saw such deeds duly executed by the grantor, the justice shall certify upon the deeds, or in a paper annexed thereto, proof of the execution of the same, whereupon such deed may be recorded in the registry of deeds, in the same manner as if the deed had been acknowledged in the usual form.⁶

Every justice of the peace, appointed for any particular county, and in which he resides, may solemnise marriages in such county, where either of the parties resides, and every justice appointed for each and every county in the State, may solemnise marriages in any county where either of the parties resides.⁷

¹R. S. ch. 170, sec. 11.

²Ib. ch. 82, secs. 35, 36, 37, 38, 39, 41, 42.

³Ib. ch. 82, sec. 47.

⁴Ib. ch. 132, sec. 2.

⁵Ib. ch. 91, secs. 16, 17.

⁶R. S. ch. 91, secs. 20, 21, 22, 23, 24.

⁷Ib. sec. 11.

Justices of the peace may appoint appraisers of property, in a variety of cases.

Justices of the peace may require hawkers and pedlars to exhibit their licenses at any and all times, and the refusal to exhibit the same is, in case of prosecution, deemed conclusive evidence of not having such licence.¹

Whenever, for want of sufficient by-laws for the purpose, or of officers duly authorised, or from any other legal impediments, a legal meeting of any corporation cannot be otherwise called, any justice of the peace in the county, where it is desirable to hold such meeting, or where such corporation is established, if it be local, may cause a meeting of such corporation to be called, and may preside therein till a clerk shall be chosen, if there be no officer present whose duty it may be to preside.²

He may also, upon application to him for that purpose, call meetings of towns, proprietors of aqueducts, mills, private ways, or bridges, of land lying in common, or of distinct pieces of land inclosed and fenced in one common field, of persons proposing to become incorporated as a parish or religious society, or for the purpose of erecting a meeting-house, or of forming associations for literary or scientific purposes, or for purchasing lands for a burying ground.³

Acknowledgements of recognizances for the payment of debts, of agreements to refer controversies, which may be the subject of a personal action, and of certificates required to be made by persons forming "limited partnerships," may be taken by justices of the peace.⁴

Justices of the peace may, on complaint, by their warrant directed to the proper officer, or any other person, cause persons coming into the State from places out of the State where any infectious and malignant distemper is known to exist, to be removed out of the State.⁵

So, baggage, clothing, or goods of any kind, suspected to be infected with any malignant contagious disorder, may be secured, under warrant from a justice of the peace, and convenient houses or stores impressed and taken up for their safe keeping.⁶

Travelers, passing into the State from infected places in adjoining States or provinces, may be licensed by a justice to travel in the county of such justice.⁷

¹Stat. of 1846, ch. 200, sec. 6.

²R. S. ch. 76, secs. 8, 9.

³R. S. chs. 85, 86, 18, 23, 25, 5, 84, 88, 29, 19.

3

⁷R. S. ch. 21, sec. 5.

⁴R. S. chs. 187, 45, 188.

⁵R. S. ch. 21, sec. 3.

⁶Ib. secs. 7, 8.

Any two justices may, by warrant under the direction of the selectmen of towns, cause to be removed, or separate accommodations to be provided for, infected persons.¹

Justices resident in any town, together with the selectmen of such town, have power to direct and order suitable watches to be kept in the night and in the day.²

IV. OF MUNICIPAL, POLICE AND TOWN COURTS, AND HOW FAR THE CIVIL JURISDICTION OF JUSTICES OF THE PEACE IS ABRIDGED THEREBY.

Municipal and police courts have from time to time been established by the Legislature in many of the principal cities and towns of the State.

Such courts have, generally, concurrent jurisdiction, under similar restrictions and limitations, with justices of the peace, over all such matters, within their county, as such justices exercise; also, in cases of forcible entry and detainer, with justices of the peace and quorum; and exclusive jurisdiction when both parties interested, or the plaintiff and a person sued as trustee, are inhabitants of the city or town where the court is established; and of all violations of the by-laws thereof.

Justices of the peace are, generally, by the acts establishing such courts, forbidden, excepting in the absence of the Judge and Recorder of such courts, or in case of a vacancy in the office of Judge, to take cognizance of, or exercise jurisdiction over, any crime or offence, or in any civil action, wherein the Judge is not a party or interested.³

All the power and jurisdiction given justices of the peace by any laws of the United States, they are not prohibited from exercising, in places where such courts are established.

In the city of Bangor, the Police Court, and in the city of Augusta, the Municipal Court, have exclusive jurisdiction in all cases of forcible entry and detainer arising in said cities; and in all civil actions, if otherwise cognisable by a justice, in which both parties interested, or in which the plaintiff and the person or persons summoned as trustee, shall be inhabitants of or residents in said cities.⁴

The Municipal Courts in the towns of Saco and Brunswick, have exclusive jurisdiction in all civil actions, if otherwise cognisable by a

¹R. S. ch. 21, sec. 6.

²R. S. ch. 31, sec. 2.

³R. S. ch. 98, sec. 15—ib. ch. 116, sec. 1.

⁴Ib. secs. 30, 31, act of 1849, ch. 224, sec. 11.

justice of the peace, in which both parties interested, or either of the principal parties, and a person summoned as trustee, are inhabitants of, or resident in said town; also in all cases of forcible entry and detainer in said town.¹

The town court for the town of East Thomaston, has exclusive and original jurisdiction within the town, over all matters which justices of the peace may by law take cognizance of and exercise jurisdiction over; and of the action of forcible entry and detainer in like manner with justices of the peace and quorum; also concurrent jurisdiction with the District Court in all suits in which a defendant resides in that town, and the debt or damage sued for and claimed, does not exceed one hundred dollars.²

The Municipal Court for the town of Rockland has exclusive jurisdiction in all civil actions cognisable by a justice of the peace, in which either of the parties, or any person who shall appear of record as interested in any such suit, or any person who shall be named therein as trustee, is a citizen of or resident in said town; and also in all cases of forcible entry and detainer in said town.³

The jurisdiction of the Police Court of the city of Gardiner is somewhat peculiar. It has concurrent jurisdiction with justices of the peace, in all matters, civil and criminal, *under* twenty dollars, within the county; and original and exclusive jurisdiction in all civil actions in which both parties interested, or in which the party plaintiff, and the person or persons summoned as trustees, shall be inhabitants of, or residents in said city of Gardiner, excepting all actions in which the Judge may be interested. The jurisdiction of this court is original and exclusive in all cases of forcible entry and detainer arising in the city. It may be presumed, that the Legislature did not intend to give the court exclusive jurisdiction in any case not cognisable by justices of the peace, that is, in civil actions in which the debt or damages demanded exceed twenty dollars.⁴

The act of 1844, establishing town courts in such counties as, by vote of the people of the counties, approved of the same,⁵ is understood never to have been in force in any county, with the exception of that

¹Act of 1849, ch. 110, sec. 2—ib. ch. 195, sec. 3. ³Act of 1850, ch. 165, sec. 2.

²Act of 1849, ch. 128, sec. 1.

⁴Act of 1849, ch. 281, sec. 11.

⁵Act of 1844, ch. 128.

of Waldo ; and in that county the jurisdiction of justices of the peace, in the trial of all civil cases, has been fully restored.¹ The acts passed at different times upon the subject of town courts are referred to in the notes.²

V. OF A DISQUALIFYING INTEREST.

No justice of the peace can lawfully sit in a case, in which he may have a pecuniary interest ; nor does it make any difference, that the interest appears to be trifling.³

Justices have no jurisdiction of actions in which either of the parties are related to them, either by consanguinity or affinity, within the sixth degree, inclusive, according to the rules of the civil law, or within the degree of second cousin, inclusive, unless by consent of the parties interested.⁴

In prosecution for penalties, however, they have jurisdiction, if otherwise entitled, notwithstanding their town may be interested in the penalty.⁵

¹Act of 1848, ch. 47.

²29 Maine R. 581, 13 Mas. R. 324.

³Act of 1846, ch. 222, act of 1847, ch. 24, ⁴Ib., R. S. ch. 1, sec. 3, rule xxii.

act of 1848, ch. 47, act of 1849, ch. 106, ⁵R. S. ch. 116, sec. 1.
act of 1850, ch. 161.

CHAPTER III.

OF THE LIABILITIES OF JUSTICES OF THE PEACE.

A justice of the peace may become liable by reason of malfeasance or nonfeasance. 1. Civilly, at the suit of the party injured. 2. Criminally, to indictment. 3. To impeachment.

1. *Civilly.* The duties of a justice of the peace, which have been already enumerated, are divisible into two parts—judicial and ministerial. As his liability varies according to the nature of the acts done, or omitted to be done, whether judicial or ministerial, it becomes important to consider the distinction between them, and to lay down some rule for governing a magistrate in determining in which capacity he is called upon to act.

The word *judicial*, which the courts have adopted, designates perhaps, as well as any definition, the acts of the magistrate to which it has been attached. A justice acts judicially, when he sits in judgment on some matter submitted, by process, to his determination. It is necessary that there should be some matter in dispute, something to be proved or disproved, upon which he is to adjudicate. He must act not simply as a matter of course; neither is it enough that he exercises his judgment and discretion; for a ministerial act by no means excludes the idea of judgment and discretion—but an adjudication is essential to the judicial action of a magistrate. All other acts are ministerial.¹

It will at once be perceived that the ministerial powers and duties of a magistrate are by far the more comprehensive of the two. They embrace all those enumerated in Chap. 2, § 2. And, in civil process, the justice acts judicially only when actually hearing and determining the matter in issue. Thus in all cases of initiatory process, such as original writs, summonses, subpoenas, &c., the affixing the proper signature and seal is a ministerial act.² So, too, in issuing execution,³

¹ Mass. Justice, 17, and cases there cited.

² 3 Pick. 407.

³ 8 Mass. 79—2 John. ca. 49.

and making up his record, he acts in the same capacity; and it was held by the court, in the case cited from the Maine Reports, that, therefore, the record might be completed by him after his commission had expired.¹

The liability of the magistrate varies according to the capacity in which he acts.

The law is well settled, both in England and this country, that a judicial officer, acting honestly in a case where he has jurisdiction of the matter and of the persons, although he may mistake, or err in the execution of his authority, is not liable to the suit of the party prejudiced by his mistake of law.²

To maintain a suit, therefore, against a magistrate, for maladministration by him while acting judicially, it is not enough to show the fact of the mistake; it is also incumbent on the plaintiff to show either that the unlawful act was done with a guilty intention, or that it was done in a matter *coram non judice*—without the jurisdiction of the court.

It would seem needless to say that, if the unlawful act be proved to have been done with a guilty intention, it becomes a crime and misdemeanor; and that the shield, which the law throws over an honest magistrate, is removed from his person. The maxim that *actus non facit reum, nisi mens sit rea*, is true, transversely—malice vitiates every thing; and our courts, in all their decisions, lay it down as a fundamental principle, that, in order to avail himself of the protection of his office, the magistrate must have acted honestly.

But if he act honestly, he must also act where both the matter and persons are within his jurisdiction, in order to avail himself of this defence. The question then arises,—What brings a matter within the jurisdiction of the magistrate?

The action must be one of those already enumerated as within the jurisdiction of justices of the peace; because the jurisdiction and power of justices are derived from statute provisions.³

He must have jurisdiction of the parties. As to what gives jurisdiction of the parties, see chapter V. “*Of where the writ must be made returnable.*”

The writ must state the names of the parties, the time and place of return, the magistrate, the cause of action, and the amount of damages;

¹2 Fair. 380.

²48 Maine 28.

³3 Wils. 121—3 Bing. 78—5 Mass 559—10 Mass.

357—1 N. H. 88—11 John, 121—17 John. 145.

and the direction must be to the proper officer. It must also bear the signature and seal of the magistrate.

It must also appear to have been properly served. Service should be made by the proper officer, and in the manner prescribed by statute; and a return should be made by the officer, showing such service.

If all these preliminary proceedings be correct, and the magistrate do not have a disqualifying interest, he will obtain a jurisdiction of the cause which will protect him in case of an honest mistake of law; unless he shall forfeit it by some subsequent act.

What may be such act can, perhaps, be better illustrated by examples.

Thus—In most of the counties in this State, it is the custom for the magistrate to keep the court open an hour after the time of the return, for the defendant to enter his appearance; and, if the defendant does not appear within the hour, to default him. On such a custom it was held, in Connecticut, that when the defendant appears during the hour, the justice not being present, and the justice returns after the hour has expired, and the defendant has gone away, then the justice cannot default the defendant and give judgment against him, and is liable in an action of trespass for so doing, his proceedings being *coram non judice*.¹

This case has been recognized as law in Massachusetts.²

And the court, in the same case, recognize the rule of law to be this, viz.: "That a party, summoned to appear at a certain designated hour, who shall duly appear at the time named, and after the expiration of one hour from that time, if no proceedings are had in relation to the matter, in consequence of the absence of the magistrate, or of the party at whose instance the summons was issued, shall not be liable to be proceeded against in his absence."

See post (Default.)

And generally, when a justice of the peace renders judgment and issues execution after his jurisdiction has ceased, as by his not being present at the time and place of trial, or by plea of title in trespass *quare clausum*, he is liable in trespass to the defendant.³

So, too, in criminal proceedings, if the magistrate proceed unlawfully in issuing process, (as by issuing a search warrant without a previous

¹12 Conn. 384.

²3 Met. 568.

³17 Maine, 418.

oath,) however honest he may have been in his error, he is liable personally for the injury resulting from the act.¹

But when a magistrate errs ministerially, the law interposes no defence between him and the consequences of his error, however honest might have been his motives. It presumes him to be acquainted with his duty; and as it leaves to him, in this capacity, nothing upon which to adjudicate, it requires him to follow strictly the path of that duty, and holds him responsible for the consequences of all error in judgment, as well as all malicious malfeasances.

Thus, if a justice of the peace issue execution against the body of a defendant who is by law privileged from arrest, and the defendant arrested, he is liable to an action for false imprisonment.²

And where a justice issued execution in two or three hours after he had rendered judgment, he was held liable to the party against whom such execution issued, and who was imprisoned thereon, in an action of trespass.³

II. CRIMINALLY.

Whenever a justice of the peace acts partially or oppressively, from a malicious or corrupt motive, he is liable to be indicted for misbehavior in his office.⁴

It has been held in England, that a justice is not liable civilly and criminally both; but that the party injured ought to make his election directly, in which mode to prosecute, and before he enters the criminal complaint.⁵

It is specially provided by the statutes of this State, that if any attorney, justice of the peace, sheriff, deputy sheriff, coroner or constable shall loan or advance, or promise to loan or advance any money, or shall give or promise to give day of payment of any money due on any demand, left with him for collection, or shall give or promise any valuable consideration, or shall become liable, in any manner whatever, for the payment of money or other thing, or shall become surety for another for such payment, or shall request, advise, or procure another person to become responsible, or to be surety as aforesaid, with intent thereby to procure any account, note, or other demand, for the

¹13 Mass. 288.

²2 John. Ca. 49.

³10 Mass. 356.

⁴15 Wend. 275, 4 Bl. Com. 141, and n.

⁵Burrows, 720.

purpose of making a profit to himself from the fees arising from the collection thereof, by a suit at law, he shall be punished by a fine not exceeding five hundred dollars, nor less than twenty dollars; or the like sum or penalty may be recovered of such offender by action.¹

So, if any person shall, corruptly and wilfully, demand and receive of another, for performing any service or official duty, for which the fee or compensation is established by law, or shall receive security for any greater fee or compensation than is allowed and provided for the same, he shall be punished, on indictment and conviction, by a fine not exceeding thirty dollars for each offence; or he shall forfeit a sum, not more than thirty dollars for each offence, to be recovered by action of debt. No indictment or action for such offence shall be sustained, however, unless commenced within one year after the commission of the offence.²

So, if any judicial officer shall corruptly accept any valuable consideration or gratuity whatever, or any promise to make the same, or to do any act beneficial to such officer, under the agreement, or with the understanding, that his decision, opinion, or judgment, shall be given in any particular manner, or upon the particular side of any question, cause or other proceeding, which is or may by law be brought before him in his official capacity, he shall forfeit his office, be forever disqualified to hold any public office, trust or appointment under this State, and shall be punished by imprisonment in the State prison, not more than ten years, or by fine, not exceeding five thousand dollars, and imprisonment in the county jail not more than one year.³

If any person shall falsely assume to be a justice of the peace, and shall take it upon himself to act as such, or require any one to aid or assist him in any matter pertaining to the duty of any such office, he shall be punished by imprisonment in the county jail, not more than one year, or by fine not exceeding four hundred dollars.⁴

Every justice of the peace who may remove from the state, shall before his removal, deposit with the clerk of the Judicial Courts in the county, for which he was commissioned, all the records and papers appertaining to his office, and neglecting so to do, shall forfeit and pay one hundred dollars, to be recovered on indictment.⁵

¹R. S. ch. 158, sec. 16.

²Ib. sec. 17.

³Ib. sec. 7.

⁴Ib. sec. 28.

⁵R. S. ch. 116, secs. 23, 25.

III. TO IMPEACHMENT.

Every person holding any civil office under this state, may be removed by impeachment for misdemeanor in office ; and every person holding any office, may be removed by the governor, with the advice of the council, on the address of both branches of the legislature. But before such address shall pass either house, the causes of removal shall be stated and entered on the journal of the house in which it originated, and a copy thereof served on the person in office, that he may be admitted to a hearing in his defence.¹

The house of representatives has, by the constitution, the sole power of impeachment.²

The senate has full power to try all impeachments. Their judgment, however, does not extend farther than to removal from office, and disqualification to hold or enjoy any office of honor, trust, or profit, under the state. But the party, whether convicted or acquitted, is nevertheless liable to indictment, trial, judgment and punishment according to law.³

CHAPTER IV.

OF THE VARIOUS MODES OF COMMENCING PROCEEDINGS.

CIVIL proceedings are commenced before justices of the peace by *writ*, *complaint*, *libel*, or *petition*.

It sometimes becomes important to ascertain what is the actual *commencement* of a suit, as in case of tender pleaded, or statute of limitations.

The suing out of the writ is the commencement of the action, unless such a construction will not accord with the truth and justice of the case. But the writ must be filled up with an actual intention of service, and not merely to be used if necessary. If, then, the writ be sued out with a *bona fide* intention of having the same served, it is a commencement of the action, which will save a demand from the effect of the statute of limitations, or of a tender. But the date of a writ is not conclusive as to the time when it was made, and the true time when it was issued may be settled by actual proof of the fact.⁴

¹ Const. art ix. sec. 5.

² Const. art. iv. (part first) sec. 8.

³ Const. art. iii. (part second) sec. 7.

⁴ 15 Mass. 364—17 Pick. 412—21 Pick. 242—1 Pick. 204—7 Green. 373.

CHAPTER V.

OF THE WRIT.

IN most cases before justices of the peace, suits are commenced by writ.

I. OF THE FORM OF THE WRIT.

The forms of writs are established by the sixty-third chapter of the law of eighteen hundred and twenty-one, which is declared by the revised statutes to be still in force; but alterations may be made by the Supreme Judicial Court or District Court, when necessary to adapt them to changes in the law, or for other causes, but all such changes shall be subject to the final control of the Supreme Judicial Court, which may, by general rules regulate such changes for said Courts, or for justices of the peace.¹

The initiatory proceedings of all processes to be commenced by writ, must be in one of the following forms :

- 1st. By original summons ;
- 2dly. By *capias* or attachment ;
- 3dly. By summons and attachment.

The nature of these writs will be explained in the present chapter.

When we reduce writs to three classes, it will not be understood that all writs of a particular class are necessarily alike. An action of *assumpsit*, an action in tort, an action of *replevin*, and a writ of *scire facias* may all be writs of original summons. The precept will be alike in all of them, and the mode of service.

1. *Original Summons.* This writ simply directs the officer to summon the defendant to appear. It is the *original* summons ; i. e. there is no other summons for the defendant, as there is in most cases where property is directed to be attached, when a separate summons is

¹R. S. ch. 114, sec. 1—R. S. ch. 116, sec. 6.

issued, directed to the defendant. All actions may be commenced by this writ, though there are none which must be. And in practice it is but little used, both because the direction to attach is usually printed in the blanks, and because of the inconvenience arising from the difference, excepting in cases where corporations are defendants, and in some other cases, in the mode of service on the defendant.

2. *Capias or Attachment.* The precept in this writ is "to attach the goods or estate of the defendant, and for want thereof to take his body." This form of writ is recognised by the revised statutes as the proper one in all cases where it is desired to attach the property of the defendant, or to arrest his body. If property is attached, then a separate summons is left with the defendant, and the writ becomes a summons and attachment. If the defendant is arrested, it becomes a *capias*.¹

3. *Summons and Attachment.* By the revised statutes, the original writ may be framed either to attach the goods or estate of the defendant, and for want thereof to take his body; or it may be an original summons, either with or without an order to attach the goods or estate.² The form most in use is that of the summons, with an order to attach goods or estate. In actions against corporations, and in other cases where goods or estate are attached, but in which the defendant is not liable to arrest, the writ and summons may be combined in one.*

It is proper in all cases in which the defendant is not liable to arrest, viz: where the defendant is a corporation, sheriff, executor or administrator, where the demand is under ten dollars, and in cases where the debtor is free from arrest under the provisions of the poor debtor laws.

The summons and attachment is a proper form of writ in all cases, where an arrest is not expected to be made, though it is said the *capias* or the *capias* and attachment should be used in all cases where the plaintiff has an election of arresting the body or attaching property, and intends to do one or the other.⁴

II. OF THE DIRECTION.

The writ must be directed to a sheriff, deputy sheriff, coroner, or constable. The usual practice is, to direct it to all who *may* serve it.

¹R. S. ch. 114, secs. 23, 24.

²Ib. sec. 23.

³Ib. sec. 25.

⁴Howe's Pr. 60.

Some direction is necessary to the officer by whom it is to be served though the want of such direction may be supplied, as a matter of form, by the court.¹

Sheriffs and Deputy Sheriffs. All processes issued by a justice of the peace may be served and executed by sheriffs or deputy sheriffs, unless the sheriff or any of his deputies be a party to the same.²

But such sheriff or deputy may serve any writs or precepts, in cases where a town, plantation, parish, religious society, or school district, is a party or interested, though he may at the time be a member of the corporation interested.³

Coroners. Where the sheriff of the same county for which a coroner is appointed, or any of the deputies of such sheriff, shall be a party to any writ or precept, the same must be served, unless served by a constable, by a coroner. And this provision includes cases of precepts, in which a town, plantation, parish, religious society, or school district is a party or interested, though such coroner may at the time, be a member of the corporation interested.⁴

When the office of sheriff in any county may be vacant, any coroner of such county shall have the like power to execute and return all writs and precepts, which are by law appointed to be served and returned by the sheriff or his deputies, until another sheriff shall be appointed and legally qualified.⁵

Constables. Constables are authorised to serve upon any person in the town to which they belong, any writ or precept in any personal action where the damage sued for and demanded does not exceed one hundred dollars, including all precepts in actions in which the town, in which he may reside, is a party or interested.⁶

As he has no authority beyond these statutes, it is said that a constable has probably no power to serve the process of forcible entry and detainer.⁷

III. OF THE DATE.

A writ should be dated on the day that it is in fact issued for service.⁸

¹11 Mass. 276

²R. S. ch. 104, sec. 19, 60.

³R. S. ch. 104, sec. 20.

⁴Ib. sec. 60.

⁵Ib. sec. 61.

⁶Ib. sec. 34.

⁷Mass. Justice, 27.

⁸Howe's Pr. 98.

IV. WHEN AND WHERE WRITS MUST BE MADE RETURNABLE.

When. There is no particular day on which justice actions must be made returnable. Custom, in the absence of law, has in many counties fixed upon the Saturday of each week for this purpose. Be it when it may, if the day of the week and of the month are each stated, care must be taken that both are correct, as a variance would be fatal.¹

Nor could the error be amended, unless the defendant should appear.²

Where. All actions and suits before justices of the peace may be heard and determined, either at their own dwelling-houses, or offices, or at any other suitable place, and their writs and processes shall be made returnable accordingly.³

This provision of statute is of course to be regulated by the general principle that writs can be made returnable only within the precinct of the magistrate issuing them. It may be proper therefore, in this connection, to consider in what cases a matter is brought within the jurisdiction of a magistrate, so as to be cognizable by him.

1st. *In case of Individuals.*—In case the plaintiff and defendant both reside in one county, the writ must be made returnable there, except as hereinafter mentioned. If the action be brought against two or more defendants, residing in different counties, it may be brought in the county where either of the defendants resides; and the writ and execution, in such case, shall be directed to and executed by the proper officers in each of such counties accordingly; but if there be but one defendant, such action must be commenced in the county where he resides.⁴

In case of trustee process, the writ must be made returnable in the county where one of the trustees resides.⁵ And if the trustee is discharged, or the action is discontinued as to him, the action shall still proceed, although the principal defendant does not reside in the county where it is brought, unless it appear by plea in abatement, that such trustee was collusively included in the writ, for the purpose of giving the court, in such county, jurisdiction; provided there was legal service on the principal defendant.⁶

¹15 Mass. 326.

²13 Pick. 93.

³R. S. ch. 114, sec. 29.

⁴Stat. of 1842, ch. 10, sec. 3.

⁵R. S. ch. 119, sec. 88.

⁶Ib. sec 96.

On all writs returnable before a justice of the peace, or municipal or police court, and on execution issued by such justices or courts, personal property may be attached in any county in the State, provided such writs or executions are directed to the proper officer.¹

When the goods of any person, not being an inhabitant of the State, and having no agent or attorney within the same, have been attached in any action before a justice of the peace, the justice may order such notice to the defendant as justice may require, and such order having been complied with, the defendant shall be held to answer to such suit, as in cases where service is made in the usual form.²

In all cases of *scire facias* against bail, or the endorser of a writ, or executors or administrators, where the defendant resides out of the county where the proceedings are had, the writ or execution may be directed to any proper officer of the county where the defendant resides.³

In local actions, although the cause of action may grow out of an injury done to real property not within the county of the magistrate, justices of the peace in the county where the defendant lives have jurisdiction.⁴

All actions of debt, founded on judgment for damages and costs, or for costs only, rendered by any court of record in this state, may be brought in the county where the same was rendered, or in the county in which either of the parties to such judgment or his executor or administrator may reside, at the time of bringing such action.⁵

2ndly. *In case of Corporations.* When both parties are towns, parishes or school districts, the action shall be brought in the county, in which either of the parties shall be situated.⁶

Where the action is between a town, parish, or school district, and any other corporation, or a natural person, it shall be brought either in the county in which the plaintiff corporation is situated, or natural person lives, or in which the defendant corporation shall be situate, or natural person lives.⁷

When one of the parties is a corporation of any other description than above named, the action may be brought in any county, in which such corporation shall have an established place of business; or if

¹Stat. of 1842, ch. 10, sec. 1.

²Stat. of 1844, ch. 86.

³R. S. ch. 116, sec. 17.

⁴15 Maine, 188.

⁵R. S. ch. 114, sec. 4.

⁶Ib. sec. 11.

⁷R. S. ch. 114, sec. 12.

either party is a natural person, the action may be brought in the county in which he lives.¹

3dly. *In case of Counties.* Any local or transitory action against the inhabitants of a county, in their corporate capacity, may be commenced and tried, either in the county where the plaintiff lives, or in the county against which the action shall be brought.²

Any action commenced by a county, may be brought in the county where the defendant lives, unless he is an inhabitant of that county; in which case the action may be commenced in any adjoining county.³

When any corporation shall be a party, in any action commenced by or against a county, it shall be commenced or tried in any adjoining county.⁴

Any such action against the inhabitants of a county, by a plaintiff belonging to such county, may be commenced and tried in such county, or in any adjoining county, at the plaintiff's election.⁵

Any local or transitory action, by one county against another, may be commenced and tried in any adjoining county.⁶

4thly. *In penal actions.* When any forfeiture is recoverable in a civil action, the same shall be brought in the county in which the offence was committed, unless a different provision is made in the statute imposing the same; and if on the trial it shall not appear, that it was committed in the county where the action is brought, the verdict shall be in favor of the defendant.⁷

V. OF THE INDORSEMENT OF WRITS.

All original writs, and writs of scire facias, shall, before entry of the same in court, be indorsed by some sufficient person, who shall then be an inhabitant of the State, when the plaintiff shall not be an inhabitant of the State; and if pending the suit, the plaintiff shall remove from the State, he shall, on motion of the defendant, or any other party to the suit, be required to procure an indorser.⁸

When there shall be more than one plaintiff, and any one of them is an inhabitant of the State, no indorser shall be required, except by special order of Court, on motion of the other party.⁹

¹R. S. ch. 114, sec. 18.

²Ib. sec. 6.

³Ib. sec. 7.

⁴Ib. sec. 8.

⁵Ib. sec. 9.

⁶Ib. sec. 10.

⁷Ib. sec. 14.

⁸Ib. sec. 16.

⁹Ib. sec. 17.

Every indorser of a writ is made liable, in case of the avoidance or inability of the plaintiff, to pay all such costs as shall be adjudged against the plaintiff; provided the suit therefor shall be brought within one year after the original judgment.¹

If, pending any suit, any indorser should, in the opinion of the Court, be deemed insufficient, it may require that a new indorser should be furnished, who is sufficient, the defendant consenting that the name of the original indorser should be struck out; and the new indorser, so furnished, shall be liable for all costs, from the beginning of the suit, in like manner as if he had been the original indorser.²

If the plaintiff shall, in any case, fail to procure such new indorser, according to the order of Court, at the time appointed, the action shall be dismissed, and the defendant shall recover his costs.³

The want of an indorser to an original writ must be taken advantage of in abatement, either by plea or motion; but it cannot avail the defendant after pleading in chief.⁴

The statute prescribes no particular form in which the indorsement must be made. The usual practice is for the indorser to write his name upon the back of the writ; and it is sufficient if he simply write the initials of his Christian name, giving the surname at length.⁵

When a person places his name upon the back of a writ, no liability to pay costs is incurred thereby, unless it is done according to the provisions of the statute. If a stranger to the suit, for example, voluntarily puts his name upon the back of a writ, when the statute does not require it and vests the Court with no authority to order it, such person would not be liable as indorser.⁶

The question has been raised whether, where a minor resides within this State, and his guardian or next friend resides without the State, the writ must be indorsed. It has never received a judicial decision, but the late Judge Howe of Massachusetts, gives it as his opinion that in such case the writ must be indorsed.⁷

VI. OF THE PARTIES.

Plaintiffs. The action should be brought in the name of all the parties having a legal interest; and, in general, in actions *ex contractu*,

¹R. S. ch. 114, sec. 18.

²Ib. sec. 19.

³Ib. sec. 20.

⁴3 Green. 216.

⁵11 Pick. 66.

⁶26 Maine, 40.

⁷Howe's Pr. 111.

the nonjoinder of a party who should have been co-plaintiff, is ground for a nonsuit. But in the case of executors, assignees, and others serving *jure representationis*, and in all cases in action *ex-delicto*, the defendant, if he would avail himself of the omission, must plead it in abatement.¹

Defendants. In actions *ex contractu*, all jointly liable should be joined as defendants ; but if there be an omission, the defendants named in the writ can only take advantage by a plea in abatement : and in actions for torts, in general, no advantage can be taken of the nonjoinder of a defendant.²

VII. OF THE DECLARATION.

Every writ must contain a declaration, consisting of one or more counts, containing the plaintiff's cause of action. This is a part, and necessary part of the writ, and therefore if a writ be made without a declaration, it is fatal, and cannot be amended by filing a count, because there is nothing to amend.³

¹1 Chitty on Pl. 7, 13, 51.

²2 Pick. 423, 4.

³1 Chitty on Pl. 24, 74.

CHAPTER VI.

OF THE SERVICE AND RETURN OF THE WRIT.

It has been already laid down, that unless the writ be properly served, and a return made shewing such service, the justice fails to obtain any jurisdiction, and his proceedings are not only void, but he is personally responsible for them, unless, in some cases, the defendant shall waive the objection. It is important, therefore, for the magistrate, both to know what is a proper service and return, and whether in each case brought before him, such service and return have been made.

I. OF THE SERVICE.

When. No person shall serve or execute any civil process, from midnight preceding to midnight following the Lord's day; but such service shall be void, and the person serving or executing such process, shall be liable in damages to the party aggrieved, in like manner as if he had no such process.¹

The writ must be duly served not less than seven, nor more than sixty days, before the day therein appointed for trial.²

In actions against counties, towns, parishes, religious societies and all other corporations, the writ must be served thirty days before the sitting of the court to which the same is made returnable.³

Upon whom. The writ should be served, in case of individuals, upon all the defendants, and in case of trustees, upon all the trustees, within the jurisdiction.⁴

Corporations. When a suit is brought against a county, the summons shall be served by leaving an attested copy thereof with one of the county commissioners, or with their clerk; and in all suits against the inhabitants of any town, parish, religious society, or school district, by leaving a copy with the clerk, or one of the selectmen, or assessors

¹R. S. ch. 114, art. v.

²R. S. ch. 116, sec. 6.

³R. S. ch. 114, sec. 44.

⁴16 Mass. 308.

of the corporation sued, if there be such officer; if not, with any member of such corporation. In suits against all other corporations, the summons shall be served by leaving a copy of it with the president, or clerk, cashier, or treasurer, or any general agent or director, as the case may be, of the corporation sued; if there be no such officer or agent found within the county where such corporation is established, or where its records or papers are required by law to be kept, such copy may be left with any member of the corporation.¹

How. It has already been seen that there are but three general kinds or classes of writs known in our practice. The service of each of them will be considered in this chapter.

1. *Original Summons.* In all cases where the process is by original summons, as against executors, administrators, guardians, and in all other civil actions, wherein the law does not require a separate summons, the service, by the proper officer, will be sufficient, either by reading the writ or original summons to the defendant, or by giving him in hand, or leaving at his dwelling house or place of last and usual abode, a certified copy thereof. Writs against towns, however, and other corporations must be served by copy, as stated above. If the defendant was never an inhabitant of the State, or has removed therefrom, then the copy shall be left with his tenant, agent, or attorney.² If a defendant, whose goods have been attached upon a writ, not being an inhabitant of the State, has no agent or attorney within the same, the magistrate may order such notice to him as justice may require.³

2. *Capias or attachment.* The precept in this case commands the officer to attach the goods or estate of the defendant, and for want thereof to take his body. If the first alternative of the precept is followed, the writ is a writ of *capias* and attachment, if the last, it is a *capias*.⁴

But when the plaintiff has once made his election how the writ shall be served, and service has been made, he shall be bound by it. Thus, where the body of the defendant was taken on the writ, and afterwards property was attached on the same writ, the court said it was clear that by law an officer could not take both body and estate; that when he had

¹R. S. ch. 114, sec. 41.

²Ib. sec. 27.

³Act of 1844, ch. 86.

⁴5 Pick. 356.

taken the body, the writ became *functum officio*, completely executed, and no further proceedings could be had thereon by the officer, except to complete his return.¹

And where property was attached, and afterwards the defendant was arrested, but before the last day of service summons was served on the defendant, and the officer returned service by attachment and summons, and made no mention of arrest, held that the service was good, as the arrest was void.²

By "arrest" is to be understood to take the party into custody. It is so used in works of authority. An arrest is the beginning of imprisonment, when a man is first taken and restrained of his liberty by power or color of a lawful warrant.³

If service be made by arrest, and the arrest be void, either because the defendant be exempt from arrest, or for any other reason, and no other service be made on the defendant, the writ should be dismissed for want of proper service, unless he appears, and waives the objection; for service not having been made according to law, the whole service is void, and the defendant has received no legal notice to appear and answer to the suit of the plaintiff.

It is not lawful to arrest, on mesne process, in any case where, after judgment, the body of the debtor is not liable to be taken in execution.⁴

No person shall be arrested in any civil action, on mesne process or execution, on the fourth day of July, or on the day of the annual fast or thanksgiving.⁵

On the day of any military training, inspection, review, or election, no officer whose duty it may be to attend, and no soldier who is enrolled as such, and shall have been duly notified to attend on said days, shall be arrested on mesne process or execution.⁶

All persons are liable to be arrested, unless specially exempted.⁷

The constitution of the United States provides that senators and representatives in congress shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to, and returning from the same.

¹3 Mass. 561.

²18 Mass. 73.

³1 Met. 504.

⁴5 Green. 291.

⁵R. S. ch. 114, sec. 101.

⁶Ib. sec. 102.

⁷Howe's Pr. 142.

The constitution of Maine provides, that the senators and representatives shall in all cases, except treason, felony, or breach of the peace, be privileged from arrest during their attendance at, going to, and returning from each session of the legislature.¹

Electors are also, with the same exception, privileged from arrest on the days of election, during their attendance at, going to, and returning therefrom.²

So a juror, or a party, or one commanded by due process of law to attend as a witness, is free from arrest while attending, or going to or from court, or a reference.³ And it is said that any party whose duty brings him to court is in the same manner privileged from arrest.⁴ A writ of protection, in such cases, may be issued by the court, but this is not essential, excepting so far as it serves to give notice to the officer.⁵

A poor debtor, after discharge under the act for the relief of poor debtors, is free from arrest for the same debt, unless he shall, having disclosed property on his examination, transfer, conceal, or otherwise dispose of the same, or refuse to deliver the same to the proper officer, so that the lien of the creditor cannot be enforced, or unless he shall wilfully disclose falsely in respect thereto.⁶

And generally, as before stated, a debtor cannot lawfully be arrested on mesne process, where after judgment, his body is not liable to be taken on execution.⁷

If in any of these cases an arrest be made, or if one be made on a precept not containing the command to take the body, the arrest is void, and, as we have already said, if no other service be made on the defendant, the writ should be dismissed for want of proper service, unless he appears and waives the objection.⁸

Before any arrest can be made upon mesne process, in any suit brought on any contract, or on any judgment founded on a contract, the creditor, his agent, or attorney, must make oath before a justice of the peace, to be certified upon such process, that he has reason to believe, and does believe, that such debtor is about to depart and reside beyond the limits of the State, and to take with him property or means

¹Const. art. iv. (part first) sec. 8.

²Const. art. ii. sec. 2.

³8 Mass. 288—6 Mass. 264.

⁴3 Mass. 288—2 Wend. 257.

⁵6 Mass. 264.

⁶R. S. ch. 148, secs. 32, 34, 47, 48.

⁷5 Green. 291.

⁸2 N. H. 463.

exceeding the amount required for his own immediate support, and that the demand in said process, or the principal part thereof, amounting to at least ten dollars, is due him.¹

In all actions not founded on contract, or on a judgment on such contract, the original process or writ shall run against the body of the defendant.²

3d. *Summons and Attachment.* The revised statutes provide that the writ in civil actions, commenced before a justice of the peace, shall be a summons, a capias and attachment. The capias and attachment is in practice, however, a summons and attachment, in cases where the debtor is not arrested, and is to be served, in such cases, by delivery, by the proper officer, to the defendant, of a separate summons, or by leaving the same at his dwelling house or place of last and usual abode.³ In actions against corporations, and in other cases where goods or estate are attached, but in which the defendant is not liable to arrest, the writ and summons may be combined in one, in which case the service is by reading the writ or original summons to the defendant, or by giving him in hand, or leaving at his dwelling house or place of last and usual abode, a certified copy thereof.⁴ If the defendant was never an inhabitant of the State, or has removed therefrom, the same rule is to be observed as in case of original summons, before referred to.

When the service of a writ is defective or insufficient, by reason of some mistake of the officer, or of the plaintiff, as to the place where, the time when, or the person with whom the summons or copy should have been left, the court may, if they think proper, order a new summons to be issued and served, in such manner as they may direct; and such service shall be as effectual, as if made and returned on the original writ.⁵

When the name of a defendant is not known to the plaintiff, the writ may issue against him by a fictitious name; and if duly served, it shall not be abated for that cause.⁶

Trustee Process. When a trustee process is issued by a municipal or police court, or a justice of the peace, the writ may contain a direction to attach property of the principal defendant in his own hands,

¹R. S. ch. 148, sec. 2.

²Ib. sec. 9.

³R. S. ch. 116, sec. 6—ch. 114, sec. 24.

⁴R. S. ch. 114, secs. 25, 26.

⁵Ib. sec. 48.

⁶Ib. sec. 49.

as well as in the hands of the person named as trustee, and is to be served by reading the writ to the defendant and trustees, or by giving them in hand, or leaving at their last and usual place of abode a copy thereof; and this will be a sufficient service on the principal, whether any trustee is holden or not.¹

II. OF THE RETURN.

It is the duty of the officer, serving any precept, to make seasonable return of the same, with his doings thereon, to the magistrate where it is made returnable. He must certify upon the back, a particular statement of the manner in which he made the service, and it is not sufficient that he return generally that he made the service according to law, but he must state the manner in which it was done, that the parties may be informed of their rights, and that the court may judge of the officer's proceedings. And unless such return be made, the case is not properly before the magistrate, and he can exercise no jurisdiction over it; though in many cases of irregularity in service of writs, a general appearance and especially a plea to the action, is a waiver of any exception to the jurisdiction.²

The return is conclusive evidence of the fact stated in it, and the magistrate cannot admit evidence *aliunde* to contradict or control it.³

After the writ is served, no alteration should be made in it, either by the officer who serves it, or by the attorney.⁴

And such an alteration makes the writ abateable.⁵

¹R. S. ch. 119, secs. 3, 87—ch. 114, sec. 26.

²11 Wend. 51.

³9 N. H. 257.

⁴2 Pick. 535.

⁵2 Conn. 377, 23 Maine, 74.

CHAPTER VII.

OF THE RETURN DAY OF THE WRIT AND PROCEEDINGS BEFORE TRIAL.

I. ENTRY.

The action should be entered on the return day of the writ, at the time and place mentioned in the writ. The entry should also be made before the magistrate personally, and not before any clerk, or other person in his absence, the words of the precept being peremptory, and the statute not authorizing any delegation of authority. When the action is entered, the magistrate should make in his *docket* a minute of the names of the parties, under which should be minuted such orders and judgments as may be from time to time made in the case.

II. COMPLAINT FOR COSTS.

It is provided by statute that if the plaintiff shall fail to enter and prosecute his action, or if on trial he shall not maintain his action, the defendant shall recover judgment for his costs, to be taxed by the justice.¹

If, therefore, the plaintiff does not enter his action, the defendant may make his complaint to the justice, setting forth the facts, and praying for judgment for his costs.

III. DEFAULT.

If any person duly served with process, shall not appear and answer thereto, his default shall be recorded, and the charge in the declaration shall be considered as true.²

And the magistrate may thereupon, and also when the action is on trial maintained, proceed to render the judgment against him. The

¹R. S. ch. 116, sec. 8.

²Ib. sec. 7.

custom prevails in most, if not in all the counties in this State, to wait one hour after the hour of the return, in order that the defendant may appear, and then, if he has not appeared, to give judgment against him on default. It has been decided in Connecticut, that such a custom is as much a part of the unwritten law as any part of the common law.¹

The Supreme Court of Massachusetts seem inclined to adopt the same rule, though they say that they do not think there is any inflexible rule, that every case of the kind then before them (disclosures under the poor debtor laws) should be proceeded in within the hour appointed, and that, at the moment the hour expires, there is a discontinuance of all cases not then brought before the consideration of the magistrate.²

The same doctrine, that the justice is bound to wait the hour before finally disposing of the case, has been recognized in New York.³

And the same courts have gone farther and said, that the magistrate is not obliged then to dispose of the case, but may, at his discretion, extend the time for either party to come in and prosecute or defend.⁴

This last question has also arisen in New Hampshire, and it has there been decided that a trustee appearing after the hour has expired, but on the same day, and denying his liability, is entitled to have the default taken off.⁵

So that the rule seems well settled that the justice is not obliged to dispose of the matter within the hour, though the plaintiff may request it; but it is always within his discretion, and it may be his duty, to wait longer for an appearance.

IV. ABSENT DEFENDANTS.

When the goods of any person, not being an inhabitant of the State, and having no agent or attorney within the same, have been attached in any action before a justice of the peace, said justice may order such notice to the defendant as justice may require; and such order being complied with, and proof of such notice being made to the satisfaction of the justice, the defendant is held to answer to such suit as in cases where service is made in the usual form.⁶

¹12 Conn. 390.

²3 Met. 568.

³20 Johns. 309.

⁴11 Wend. 51.

⁵9 N. H. 257.

⁶Acts of 1844, ch. 86.

This statute makes no provision as to the mode in which the fact of the absence from the State shall be brought to the knowledge of the magistrate. Ordinarily it will appear, either by the officer's return upon the writ, or by the description of the defendant in the writ, but, of course, may be shown in any other way. The form of notice is not prescribed by statute. It has usually been given in the higher courts, by publishing a copy of the order in some public newspaper ; but, where the amount involved is so small as to come within the jurisdiction of a justice of the peace, unless the parties request otherwise, if the place of residence of the defendant be known to the magistrate, a copy of the order sent to him by mail complies with the spirit of the statute, and is attended with less expense.

For the form of such notice to absent defendants, see the forms at the close of the work.

V. APPEARANCE.

An appearance by the defendant, at the time and place for the return of the writ, or if the action be continued, at the time and place to which it is continued, prevents a default. This appearance may be made, either by the defendant personally, or by attorney. The magistrate should minute on his docket the day of the appearance, and if by any other person than the defendant, the name of the attorney. An appearance may be general or special. As the effect of a general appearance is to waive technical objections, the magistrate should be careful, where the appearance is special, to note that it is so.

VI. PLEADINGS, AND MOTIONS TO DISMISS.

In all cases, excepting those in which title to real estate comes in question, the general issue must be pleaded.¹ The proceedings where title to real estate is brought in question will be treated of in a subsequent division of this chapter. The form for a plea of the general issue will be found among the forms in civil proceedings.

The more common practice is to write the plea upon the back of the writ, the plaintiff joining issue, upon the same paper, in the brief form, "and the plaintiff likewise." If the plea is written upon a separate

¹R. S. ch. 116, sec. 30.

paper, it is usually enclosed in the writ. It will be found convenient to note upon the back of the plea, and upon all papers filed in the cause, what the paper is, the cause in which, and the time when it is filed.

When it is provided in the statute that the general issue shall be pleaded in all, excepting certain excepted cases, it is not intended to exclude such pleas and motions as go to defects in the plaintiff's writ or proceedings, and which are generally waived by pleading the general issue. The more common forms of them are those of motions to dismiss the action, and pleas in abatement. The former can only be entertained, when the matter of exception is apparent upon the face of the proceedings, or more plainly, when the magistrate may have information of the defect, without proof of facts apart from the papers before him. When it is necessary to bring before him some matter of fact not apparent in the record and proceedings, a plea in abatement must be filed¹ Demurrers are not often resorted to before magistrates. When, however, a party is willing to admit the facts alleged in the declaration of the plaintiff, or in the plea of the defendant, but at the same time desires to deny that the facts so admitted are sufficient to sustain the action, or the answer to the action, as the case may be, he may have that question tried by filing a demurrer to the declaration or plea. A form for a demurrer will be found in a subsequent chapter of this work.

VII. PROCEEDINGS WHERE TITLE TO REAL ESTATE IS IN QUESTION,
AND IN REPLEVIN FOR BEASTS DISTRAINED OR IMPOUNDED, WHERE
THE DAMAGES DEMANDED EXCEED TWENTY DOLLARS, OR THE
PROPERTY IN THE BEASTS IS IN QUESTION, AND THEIR VALUE
EXCEEDS THAT SUM.

When in any action pending before a justice of the peace, it shall appear, by the pleadings, or the brief statement filed in the case by either party, that the title to real estate is concerned or brought in question, the case must, at the request of either party, be removed to the District Court, to be there tried in the same manner, as if it had been originally commenced in that court.²

¹ Met. 508.

²R. S. ch. 116, sec. 3.

The title to real estate cannot be said to be brought in question, in the sense intended by the statute, when it is not put in issue by the pleadings, and cannot be affected by the judgment. For example, in an action of assumpsit to recover compensation for the use of certain real estate, if the defendant pleads the general issue, and files a brief statement, in which he denies that the plaintiff had any title to the real estate, and alleges that he occupied under one who had title, the title is introduced in a collateral manner, and is used only to prove or disprove the issue, and is not put in issue by the parties.¹

The party requiring the cause to be removed, shall recognise to the other party, in a reasonable sum, with sufficient surety or sureties, with condition to enter the action at the District Court, next to be held in the same county; and if he fail so to recognise, the justice shall hear and decide the cause in like manner, as if no such request had been made to remove the cause.² If no request be made by either party, the magistrate will, of course, proceed to try the cause, upon the issues presented by the pleadings.

In actions of replevin, against the impounder or finder of beasts, distrained or impounded, in order to recover any penalty of forfeiture supposed to have been incurred by their going at large, or to obtain satisfaction for any damages, alleged to have been done by them, when it appears that the sum demanded for the penalty, forfeiture, or damages, exceeds the sum of twenty dollars, or that the property of the beasts is in question, and that their value exceeds twenty dollars, or that the title to real estate is concerned or brought in question, the case shall, at the request of either party, be transferred to the District Court; provided the party requesting such transfer, shall recognise in such reasonable sum as the justice shall order, to enter the action at the next term of the court, to which the action is transferred, and prosecute the same with effect, and to pay all intervening damages and costs.³

Although the statute does not, in terms, require that, in actions of replevin, the title to real estate must appear, by the pleadings, to be brought in question, yet it is rather to be presumed, that the legislature intended the same course of proceedings should be had in this kind of action, as in others, where the title to real estate is brought in question.

¹27 Maine, 85.

²R. S. ch. 116, sec. 4.

³R. S. ch. 180, sec. 7.

It is said by the Supreme Court of Massachusetts, in commenting upon a somewhat similar statute, that it is not strictly correct to say, that the jurisdiction of the justice is nullified as soon as the plea of soil and freehold is filed; but that he still retains the power to act on a motion to waive the plea or amend it, or to amend the declaration.¹

VIII. AMENDMENTS.

It is provided by the revised statutes, that no summons, writ, declaration, plea, process, judgment, or other proceedings in courts of justice, shall be abated, arrested, or reversed, for any kind of circumstantial errors or mistakes, when the person and case may be rightly understood by the court, nor for want of form only, and which by law might have been amended; and that all such errors, imperfections and defects, may, on motion, be amended by either party, on such terms as the court may direct.²

It is further provided, that in all actions, when there are two or more defendants, the plaintiff may amend the writ, by striking out the names of one or more of them, on paying him or them their costs up to that time; and that in any action or contract, express or implied, the plaintiff may, on motion, amend his writ, by inserting therein the names of any other person or persons, as defendants, and the court may order a copy of the writ, and the order of the court thereon indorsed, to be served on such additional defendant, and his property to be attached in the same manner as in case of original writs; and on return of such service and attachment, if any shall be made, such additional defendant or defendants shall be deemed parties to the suit, and may plead to the action accordingly.³

It was frequently difficult to determine, at common law, in many cases, whether a declaration in trespass, or trespass on the case, was the proper form of action. The distinction between these modes of declaring is now abolished by statute, and it is provided that the declaration shall be equally good and valid, whether the same shall be in form the one or the other.⁴

If a writ has been lost or destroyed by accident, it is provided by statute that the plaintiff may be allowed to file a new writ corresponding,

¹19 Pick. 419.

²R. S. ch. 115, secs. 9, 10.

³R. S. ch. 115, secs. 11, 12.

⁴Ib. sec 13.

as near as may be, with the one so lost or destroyed, when the action may be proceeded in in the same manner as if the original writ had been preserved. The fact of the loss may, in such case, appear to the court by affidavit of the plaintiff, or otherwise.¹

The statutes have now placed the whole subject of amendments on so liberal a ground, that much of the old learning is entirely done away with, and the power of amending has almost become co-extensive with the capacity of making mistakes. Yet, as there must be some limit to this power, we shall consider the authority of justices to amend mistakes. 1st. In the parties; 2d. Writ; 3d. Return; 4th. Declaration; 5th. Pleadings; 6th. In other matters.

It may be laid down as a well settled rule, that, where there is no statute on the subject, the granting of amendments is a matter wholly within the discretion of the court.²

The magistrate will therefore, where an amendment is prayed for, first look to see whether any statute makes it obligatory on him to grant the motion. If he finds none, he will then exercise his best judgment and discretion, looking to the situation of the parties, and the justice of the case. And he should make it his universal rule, not to grant such motions on an *ex parte* hearing, where there is an appearance on the other side.

1. *Parties.* In regard to defendants, the power of striking out from the writ a part of the defendants, and discontinuing as to them, and the terms on which it shall be done, and likewise the power and mode of bringing in new defendants after the entry of the action, are regulated by the statutes cited above. It only remains to add, that where in an action on a contract, a part of several defendants are defaulted, and the rest appear, and defend successfully, the plaintiff cannot take judgment against the defaulted defendants. Where, however, a defence can be made by one or more of the defendants, which admits the making of the original joint contract, but shows matter of personal exemption or discharge, as in case of coverture or infancy, or discharge in bankruptcy, but which leaves the other contracting party liable to the performance of the contract, such party may have a separate judgment against the plaintiff, and the plaintiff a valid judgment against the other defendant.³

¹ Acts of 1848, ch. 57, sec. 1.

² 10 Pick. 281.

³ 3 Green. 183.

The name of a new plaintiff cannot be inserted, nor that of a plaintiff stricken out.¹

2. *Writ.* Amendments of the writ in matters of form are allowed without costs. In matters of substance, amendments are not to be allowed without terms.²

It is said, that if a wrong writ be issued, as a *capias* against an executor or a corporation, or an illegal service made, as property attached, or the body arrested on an original summons, no amendment will be allowed, as none could set it right, the whole proceeding being void ;³ but in the case cited from 15 Maine Reports, 400, the process was by original summons, and an illegal service was made by leaving a separate summons, and yet the court granted, on terms, an amendment, by which the writ was changed to a writ of attachment. The teste if a writ may be amended, without terms.⁴ The seal has been held to be matter of substance, and so is said to be the indorsement.⁵ The direction of the writ to the officer may be amended, when the writ has been properly served.⁶ The *ad damnum* may, before judgment, be increased or diminished, or where no damages have been laid in the writ, a sufficient sum may be inserted.⁷ The date of the writ is amendable.⁸ Where a writ purports to issue from one court, it cannot be amended by inserting the proper words of a writ issuing from another court.⁹ The return day, it seems, cannot be amended.¹⁰

3. *The Return.* The question oftentimes comes before a magistrate, how far an officer may be allowed to amend his return, after entry of the action. When the officer has minutes from which either to complete, alter, or amend his return, so as to make a correct return, he may be allowed to amend it, even though some years after the entry of the action, and though his own term of office may have expired, and the parties to the suit shall be bound by it. But if the amendment will alter or affect the rights of third persons, who are not parties to the suit, it ought not to be allowed, or, if allowed, will not avail as against such third persons.¹¹

¹² Green. 120—7 Pick. 62.

¹⁵ Maine 400.

⁹ Maine Justice, 77.

⁴ 15 Maine, 431.

¹² Maine, 196—15 Maine, 433—16

Maine, 263—11 Maine, 177.

⁶ 9 Mass. 95.

⁷ 6 Green. 307—15 Maine, 431.

¹⁶ Pick. 297.

²³ Pick 110.

¹⁰ 16 Maine 266.

¹⁸ Mass. 240—9 Pick. 169—17 Pick.

193—14 Pick. 32—1 Pick. 461.

4. *The Declaration.* When the writ contains no declaration, when it is served, a new declaration cannot be inserted by way of amendment;¹ but a declaration so defective that it would exhibit no cause of action, may be cured by amendment, without introducing any new cause of action.² An amendment changing the form of action, for example from *debt* to *case*, is not authorised.³

The general rule may be stated to be, that amendments are uniformly allowed, when they do not introduce a new cause of action, and when they are required by the justice of the case.⁴ What is a new cause of action is frequently a question of difficulty. An amendment which changes the alleged date of a contract, or the sum to be paid, or any particular of the matter to be performed, or the time or manner of performance, changes, in one sense, the form of action; but it is not in this sense that the rule is to be understood. Amendments of that character, so long as the identity of the matter upon which the action is founded is preserved, are admissible; the alteration being not to enable the plaintiff to recover for another matter than that for which he originally brought his action, but to cure an erroneous or imperfect statement of the subject matter, upon which the action was in fact founded.⁵ When the writ contained but one count, and that upon an agreement to become insurer of a vessel, by a policy to be made, it may be amended by inserting a new count upon a policy as actually made.⁶ So a negotiable note, given for a balance of an account, does not constitute a different cause of action from the account itself.⁷ When an action was brought for goods sold and delivered, and on a special agreement as to the mode of payment, the plaintiff was allowed to amend by inserting a count upon a warranty of the genuineness of certain paper received in payment.⁸

5. *Pleadings.* Under this head, in our practice, may be classed pleas, bills of particulars, set-off, tender, offers to be defaulted, and any thing put into the case by either party which goes to make up the issue. In all these matters the discretionary power of the magistrate should be exercised with great care, and with great hesitation, particularly after the parties have once gone to trial on the issue joined. It

¹19 Pick. 376—2 Pick. 420.

²25 Maine, 249..

³28 Maine, 215.

⁴Colby's Pr. 170.

⁵10 N. H. 341.

⁶Loring and Proctor—26 Maine, 18.

⁷3 Met. 273.

⁸1 Met 547.

has been held in New York that pleas in abatement, being dilatory pleas, are not amendable.¹

6. *In some other matters.* The certificate of justices of the peace that they administered the oath prescribed by law to a poor debtor committed on execution, may be amended even after action brought upon the debtor's bond for the liberty of the jail limits.² An error in taxation of costs, by omitting an item, may be amended, after execution issued, if there be any thing to amend by.³

Records. An apparent error on the face of a record may be amended by another part of the same record ; and all circumstantial errors, clerical mistakes, and defects in form may be amended.⁴ Certificates of oaths may be amended by adding the words "justice of the peace."⁵ The justices, administering the oath to a poor debtor, may amend their certificate, by adding, in accordance with the truth, the mode in which they were selected.⁶ The date of a certificate of an oath taken by a magistrate may be amended, if erroneous.⁷

Of the Terms, Time, and Form of Amendments. No restrictions are imposed on a magistrate as to the time when or the terms upon which he may grant motions to amend. Indeed, the whole subject of amendments is left very much to his discretion. The rule upon which custom seems to have settled down is, that when the amendment prayed for is in any thing material, some terms, either costs, part costs, or a continuance, shall be imposed.

Amendments are granted on motion, and not as a matter of course. The motion should be made in writing, and filed in the case, and if granted, an order is made to that effect. Nothing else is necessary. The magistrate should be particularly careful *not to alter any of the papers*. This is an alteration, not an amendment. The motion, if properly drawn, will show exactly the change prayed for, and the order of the magistrate will decree that change. This constitutes the amendment.

IX. BILLS OF PARTICULARS.

A bill of particulars is a statement of the plaintiff's cause of action, and when filed, becomes, in fact, a part of the declaration, and the

¹ 5 Wend. 72.

² 4 Met. 455.

³ 6 Green. 415.

⁴ Howe's Pr. 382.

⁵ 6 Green. 106.

⁶ 26 Maine, 444.

⁷ 20 Maine, 301.

plaintiff is bound by it. It may, and should be ordered, when the plaintiff fails to set forth his cause of action with sufficient distinctness for the defendant to know what he is summoned to answer to. In actions of assumpsit on notes of hand and book accounts, nothing is more common than for the plaintiff to declare in the general counts alone, which give the defendant no intimation of the cause of action. The magistrate may require a bill of particulars on motion of the defendant, and refuse to proceed with the cause until the plaintiff complies with the order.¹

After the bill of particulars is furnished, the plaintiff cannot, upon trial, contradict it, or give evidence of any demand not contained it, unless specially declared or on some count in the declaration.² A bill of particulars is, however, amendable, in the discretion of the court.³

X. SET-OFF.

When there are mutual debts or demands between the plaintiff and defendant in any action, one demand may be set-off against the other.⁴

The defendant shall file a statement of his demand on the return day of the writ, notice of which should be entered by the justice on his docket, under the action.⁵

The demand of the defendant shall be as certain in substance, as would be required in a declaration, and the court may allow amendments thereof, when deemed proper.⁶

No demand can be set off unless it is founded upon a judgment or contract ; but the contract may be either expressed or implied.⁷

No demands can be set-off unless for the price of real or personal estate sold, or for money paid, money had and received, or for services done, or unless it be for a sum liquidated, or one that can be ascertained by calculation.⁸

No demand can be set-off, not originally payable to the defendant in his own right ; unless it has been assigned to the defendant, with notice to the plaintiff of the assignment before the action was commenced, or the plaintiff shall have at any time previously agreed to receive it

¹Howe's Pr. 410, 418.

²Colby's Pr. 203.

³Colby's Pr. 105.

⁴R. S. ch. 115, sec. 24.

⁵Ib. sec. 25—Act of 1847, ch. 20.

⁶R. S. ch. 115, sec. 26.

⁷Ib. sec. 27.

⁸Ib. sec. 28.

in payment, or part payment of his demand, or to pay the same to the defendant.¹

If the demand set-off is founded on a bond or other contract having a penalty, no more shall be set-off than the sum equitably due.²

The set-off is allowed in all actions founded on demands, which could themselves be the subject of set-off according to law, and in no others.³

If there are several plaintiffs, the demand set-off shall be due from them jointly ; and if there are several defendants, the demand set-off shall be due to them jointly ; but when the person, with whom a contract is made, has a dormant partner, and a suit is brought on such contract, by or against the partners jointly, any debt due to or from the person, with whom the contract was made, may be set-off in like manner, as if such dormant partner had not been joined in the suit.⁴

If the demand, in which the action is brought, has been assigned, and the defendant had notice of the assignment, he is not allowed to set-off any demand that he may have acquired against the original creditor after such notice.⁵

When an action is brought by one person in trust, or for the use of another, the defendant may set-off any demand against the person, for whose use or benefit the action is brought ; and in actions by executors and administrators, demands against the testators or intestates, which belonged to the defendant at the time of their death, may be set-off in the same manner as if the action had been brought by the deceased. In this latter case, if a balance is found due the defendant, the judgment therefor shall be in the same form, and have the same effect, as if the suit had been originally commenced by the defendant, unless the estate of the deceased is insolvent, in which case no judgment shall be rendered for the defendant, but the statute provides that the same shall be certified by the clerk of the court ; (and in actions before a magistrate, he would not refuse to give his certificate in like manner) and the same shall be laid before the commissioners on such estate, as other claims of creditors are.⁶

In actions against executors and administrators, and trustees and others in their representative character, the defendants may set-off demands belonging to their testators or intestates, or those whom they

¹R. S. ch. 115, secs. 29, 30.

²Ib., sec. 31.

³Ib. sec. 32.

⁴Ib. secs. 33, 34.

⁵Ib. sec. 35.

⁶R. S. ch. 115, secs. 36, 37, 38, 39.

represent, in the same manner as the persons represented would have been entitled to set-off the same, in an action against themselves.¹

In actions brought by or against executors, administrators or trustees, or others in their representative character, no demand can be set-off, that is due to or from such executors, &c., in their own right.²

All cases of set-off may be tried upon the issue joined, without any further plea; and in all actions, except assumpsit, when an issue to the country is not otherwise joined, the defendant may plead that he does not owe the sum demanded by the plaintiff, which shall be deemed a good plea or general issue, for the purpose of trying the merits of the cause; and the plaintiff shall be entitled to every ground of defence against such set-off, of which he might have availed himself by any form of pleading, in an action brought against him on the same demand.³

The statute limiting personal actions, if applicable to the set-off, shall be applied in the same manner, as if an action thereon had been commenced at the time when the plaintiff's action was commenced.⁴

If no balance is found due to either party, judgment is to be entered accordingly, without costs to either party; if a balance is found due the plaintiff, judgment is to be rendered therefor. When a balance is found due from the plaintiff, judgment shall be rendered therefor in favor of the defendant, with costs; but no judgment shall be rendered against the plaintiff, when the demand for which the action was brought had been assigned before the commencement of the action, nor for any balance due from any other person than the plaintiff; and in no case shall judgment be rendered for the defendant for more than twenty dollars, exclusive of costs.⁵

After a demand has been filed in set-off, the plaintiff shall not be allowed to discontinue his action, unless by consent of the defendant.⁶

If the defendant is deprived of the benefit of the set-off, by the non-suit, or other act of the plaintiff, he may commence a new action thereon within six months from the time of the determination of the original suit, notwithstanding his demand would be barred by the provisions of the statute of limitations.⁷

¹R. S. ch. 115, sec. 40.

²Ib. sec. 41.

³Ib. secs. 42, 43.

⁴R. S. ch. 115, sec. 44.

⁵Ib. secs. 45, 46, 47.

⁶Ib. sec. 48.

⁷R. S. ch. 146, sec. 26.

When an action is brought in this State by any person who is not an inhabitant thereof, or who cannot be found therein to be served with process, he shall be held to answer to any action brought against him by the defendant ; provided the demand in the two cases be of such a nature, that the judgment or execution in the one case can be set-off against the judgment or execution in the other. If there are several defendants in the original action, each of them shall be authorised to bring such cross action against the original plaintiff ; and upon recovering judgment therein, he may be allowed to set-off his judgment in that which may be recovered against himself and his co-defendants, in like manner as if the latter judgment had been against himself alone. The writ in such cross action may be served on the person, who appears as attorney of the plaintiff in the original action ; and in the cases mentioned, the court may order such continuances as justice may require for the defence of either of the actions, or for setting off the demand as above mentioned.¹

XI. OFFER TO BE DEFAULTED, AND TENDER.

In an action founded on judgment or contract, the defendant may offer and consent, in writing, to be defaulted, and that judgment may be entered against him for a specified sum as damages ; and the same shall be entered on record, and the time when the offer was made ; and if the plaintiff shall proceed to trial, and recover no greater sum for his debt or damages, up to the time when the offer was made, the defendant shall recover his costs of the plaintiff, from the time of such offer, up to the time of trial ; and such costs shall be set-off against the sum so offered, and judgment shall be rendered, and execution issued for the balance for either party, which way soever the case may be.²

Any person, after the commencement of a suit against him, and before the entry thereof in court, shall have the same right to tender payment of the amount due, to the plaintiff or his attorney in the action, as before the commencement of the suit.³

In all cases of tender both before and after action brought, the defendant, if he would avail himself of it, must bring it into court, with what is called a *profert in curia* ; that is, he must deposit it with the

¹R. S. ch. 114, secs. 74, 75, 76.

²R. S. ch. 115, sec. 22.

³Act of 1841, ch. 1, sec. 19.

magistrate, proffering it is a full satisfaction of the plaintiff's demand. He will also at the same time pray that his costs may be taxed, and offer to pay them.¹

Unless such a profer be made, the previous tender will avail the defendant nothing. Such a profer may also be made without a previous tender.

When, however, acts are to be performed by each party to a contract at the same time, and one tenders money in performance of his part, and brings his action to recover damages on failure of the other party, he is under no obligation to bring the money into court.²

If the plaintiff fails to recover more than the defendant pays into court, the defendant takes costs from the time of the payment into court, if there were no previous tender, otherwise from the time of the tender.

The payment of money into court is an admission of the cause of action as set forth in all the counts, unless specially made ; and where there is a bill of particulars, it is an admission of all the items, unless specifically applied. But it is within the discretion of the court to apply this rule, or not, as justice may require.³

An offer to be defaulted is not an admission of the contract as stated in the plaintiff's declaration.⁴

It hardly need be said that a tender after action brought and before it is entered, can be made so as to avail the defendant only in actions on contracts.⁵

Nothing but gold and silver coin is a good tender.⁶

But, if a plaintiff does not object to bank notes at the time of the tender, they are considered as good, being themselves money.⁷

The act of Congress of 1843 provides that the following coins shall pass current as money, within the United States, and be receivable by weight, for the payment of all debts and demands, at the rate following : The gold coins of Great Britain, of not less than nine hundred and fifteen and a half thousandths in fineness, at ninety four cents and six tenths of a cent per penny weight ; and the gold coins of France of not less than eight hundred and ninety nine thousandths in fineness, at ninety two cents and nine tenths of a cent per pennyweight ; the Spanish

¹17 Mass. 392.

²15 Maine, 61.

³5 Pick. 290.

⁴20 Maine 37.

⁵17 Pick. 369.

⁶Const. U. S.

⁷9 Pick. 542.

pillar dollars, and the dollars of Mexico, Peru, and Bolivia, of not less than eight hundred and ninety-seven thousandths in fineness, and four hundred and fifteen grains in weight, at one hundred cents each ; and the five franc pieces of France, of not less than nine hundred thousandths in fineness, and three hundred and eighty four grains in weight, at ninety three cents each.¹

In all actions of trespass upon lands, wherein the defendant by his plea or brief statement, disclaims all right, title and interest in the land upon which the trespass is alleged to have been committed, and declares that the trespass was involuntary, or by negligence or mistake, and that he had tendered or offered sufficient amends therefor, before the action was commenced, or brings money into court to satisfy the damage the plaintiff has sustained, with costs; if upon trial it appear, that such trespass was involuntary, or by negligence or mistake, and the jury shall not assess greater damages for the trespass than the money tendered or brought into court therefor, the defendant shall recover of the plaintiff his reasonable costs.²

XII. OATH, MARRIAGE, &C. OF A PARTY.

In case of the death of either party in any action, the executor or administrator of the deceased, if the cause of action survive, may become a party to such action, such death being suggested upon the record; and the surviving party may cause the executor or administrator of the deceased party, to be served with notice from the court, fourteen days before the sitting of the court to which the same is returnable, to appear and prosecute, or defend such action, as the case may be ; and upon refusal or neglect of such executor or administrator, so to appear and become a party to the suit, the court may enter up judgment upon the nonsuit or default, as the case may be, in the form prescribed in actions by or against executors and administrators.³

Whether the cause of action survive or not, depend, generally upon whether it is upon contract or for tort, the former surviving, the latter, generally, not.⁴ Acts on torts survive, when the estate of the

¹ Acts of Congress of March 3, 1843, and 18 Jan. 1837.

² Act of 1841, sec. 19.

³ R. S. ch. 115, sec. 81.

⁴ Mass. 480—1 Pick. 71.

deceased received some gain, or his personal property was injured by the wrong.¹

Actions in favor of or against any sheriff, coroner, or constable, to enforce any right, or for any act done by virtue of any precept, directed to either of said officers, in case of the death of any such officer, and no administration granted upon his estate, at the expiration of three months from the time of such death, may be prosecuted or defended by the party for whose interest such officer acted, by such party entering his own appearance, and giving such security for costs, as the magistrate may direct.²

No action, brought by any public officer in his official capacity, shall abate by reason of the death of the plaintiff; but such action may be prosecuted by his successor in office, to the uses for which the action was originally commenced; and the court before which such action may be pending, may order such amendments of the process, and such notices to the said successor, as may be necessary.³

Persons under sentence of death, or imprisonment for life, and confined in the State prison in pursuance of such sentence, are to be treated, so far as their property is concerned, as if their death had taken place at the time of such imprisonment.⁴

If any person who is summoned as a trustee in his own right, shall die before the judgment, if any, recovered by the plaintiff, shall be fully satisfied, the goods, effects and credits in his hands at the time of the attachment, shall remain bound thereby, and his executors and administrators shall be liable therefor, in like manner as if the writ had originally been served on them. If the person so summoned shall die before judgment in the original suit, his executor or administrator may appear voluntarily, or may be cited to appear, in the same manner as is provided in the case of a common defendant in a common action; and the further proceedings shall then be conducted in the same manner as if the executor or administrator had been originally summoned as a trustee, except that the examination of the deceased, if any had been taken and filed, shall have the same effect as if he were living. If in such case, the executor or administrator shall not appear, the plaintiff, instead of suggesting the death of the testator or intestate,

¹21 Pick. 250.

²Act of 1848, ch. 59.

³R. S. ch. 115, sec. 120.

⁴Act of 1848, ch. 80.

may take judgment against him by default or otherwise, as if he were living, and the same proceedings shall, in such case, be had, as if the executor or administrator had himself been adjudged trustee. If the executor or administrator be discharged upon *scire facias*, he may recover costs or not at the discretion of the court.¹

If any action or suit be brought by an unmarried woman, either alone or jointly with others, and she be married before final judgment, her husband may, on his own motion, be admitted as a party to prosecute the suit with her, and with the other plaintiffs, if there be any, in like manner as if he had originally joined in the suit.²

If during the pendency of any action, either party shall become insane, the action may be prosecuted or defended by his guardian, in like manner as if it had been commenced after the appointment of the guardian; or the court may appoint a guardian for the suit, as the case may require.³

XIII. BANKRUPTCY.

When an action shall have been brought against any person, if he, upon his own application, shall have been declared bankrupt by a decree of the District Court of the United States, during the pendency of said action, neither he nor his assignee shall be entitled to recover costs in said action; nor in any action, where the defendant shall rely upon his certificate of discharge in bankruptcy as a matter of defence, and where the said certificate was obtained after the commencement of the suit, shall such defendant recover costs against the plaintiff till after the said certificate shall be obtained, pleaded and produced in court.⁴

XIV. CONTINUANCE.

Every justice may adjourn his court in all cases, civil or criminal, on trial before him, to any other time or place, as occasion shall require.

It is the practice, in some of the counties of this state, to make the writs returnable on the Saturday of each week, and to continue as a matter of course to the Saturday of the next week, if the defendant

¹R. S. ch. 119, secs. 44, 45, 46, 47, 48, 49.

²R. S. ch. 115, sec. 82.

³Ib. sec. 86.

⁴Act of 1844, ch. 115—act of 1848, ch. 60.

appears. Where such practice prevails the justice ought not to drive either party to trial, although the other party may be ready with his witnesses, unless a notice has been served by the party ready for trial, upon the other party, that he shall insist upon trial at the return-day of the writ. Such notice should be served a reasonable time before the return day.

And in all cases where absent defendants, other parties, or executors, or administrators are to be cited in, the action must be continued.

The magistrate has, however, no right to order a continuance prior to the return-day of the writ. And if the action has once been continued, he has no right to order a further continuance, before the day arrives to which the first continuance was made.¹

¹17 Maine, 418.

CHAPTER VIII.

OF THE COURSE OF THE TRIAL, AND OF WITNESSES.

THE proceedings which have been thus far considered are preliminary only to the actual trial. Their office is to assist in forming the issue which the parties are to join.

When the issue is determined, the parties are ready for trial, and no alteration should be made in it after the trial has commenced.

The party assuming the affirmative is to open the case. Ordinarily the plaintiff is the affirming party, and as such, the burden of proof being upon him, he has the opening and closing. It is hardly possible under the present form of pleading, that any exception to this rule can occur before a justice of the peace. And it makes no difference whether the issue be one in law or fact; the rule is the same.

The plaintiff having stated his case, and what he expects to prove, next proceeds to call his witnesses, and put in his evidence. The evidence may be of two kinds—written, or parol. In case of written evidence, if it be private writings, he will be prepared with the necessary proof of their execution, which must be put in before they can be admitted; and if it be a deposition, it must be taken in the mode prescribed by law.

OF WITNESSES.

A treatise upon the various kinds of evidence, and the manner in which each particular issue must or may be proved, cannot be expected within the limits of this book. Its plan will not permit more than an outline view of the subject.

1. All witnesses are competent, unless, 1st. They are parties to the record; 2d. Are interested in the suit; 3d. Are deficient in understanding; 4th. Have been convicted of some infamous offence; or, 5th. Should be excluded on grounds of public policy.

I. The general rule is that a *party to the record* in a civil suit, *cannot be a witness*, either for himself, or for a co-sutor in the cause.¹

And this rule also extends to the case of members of corporations, parties to the record.²

The only exceptions known in our law to this rule are,

1st. The provision in the revised statutes, that in all suits at law, wherein any county, town, plantation, parish, school district, public corporation, charitable, religious, or literary incorporated society, or any mutual fire insurance company, may be a party, or interested in the event of the suit, any inhabitant or member of any such corporation shall be admitted as a competent witness ; provided he has no other interest therein than as such inhabitant or member.³

2d. The provision of the Revised Statutes that in case of trustee process, where the trustee in his answer discloses an assignment, and the assignee is summoned in to defend, upon trial, between the attaching creditor and the assignee, the principal defendant may be examined as a witness for either party, if there is no other objection to his competency, except his being a party to the original suit.⁴

3d. The rule admitting the suppletory oath of a party to original entries.

If it shall appear to the court, on the oath of the party offering the books, that it is not the book of *original* entries of his daily transactions in business ; or that it is not free from fraudulent practices ; or that the entries were not made at or about the time of the goods delivered, and the services performed ; or that the entry was not made for the purpose of charging the debtor with the debt ; or that there have been alterations, additions, or erasures since the time of the original entry ; or that the articles therein charged were not actually delivered, and the services actually performed ; or that the sums charged and claimed have not been paid, then the magistrate will reject the books ; as, in order to bring himself within the exception to the general rule, and make himself a witness in his own cause, the plaintiff must strictly comply with the letter of the law.⁵

¹ Green. Ev. § 329.

²Ib. § 331, 332, 333.

³R. S. ch. 115, sec. 75.

⁴R. S. ch. 119, sec. 39.

⁵1 Green. Ev. § 118, and note.

It is not necessary to establish the opposite of all these propositions, that the evidence may be admitted ; but if any one of them should appear in the course of the examination of the plaintiff the evidence must be rejected.

The books of a plaintiff, accompanied by his oath, are insufficient to prove a charge for money paid, if the sum charged exceed \$6.67.¹

If the articles charged appear, from the inspection of the book of accounts, to be such as ordinarily could not have been delivered without the assistance of a third person, the oath of the party will be rejected, on the ground that better proof can probably be had.² And, generally, where, from the nature of the case, better evidence can be had, the oath of a party is not allowed.³

4th. In any action brought to recover money or goods lost in gaming, if the plaintiff shall offer to make oath, that the money or goods were lost by gaming with the defendant, as alleged in the declaration, judgment shall be rendered for the plaintiff, unless the defendant make oath that he did not obtain the same, or any part thereof, by gaming.⁴

5th. In actions on contracts, in which is reserved usurious interest, the debtor, or any one of them, if there are two or more, may, if the creditor be alive, come into court, and swear to the fact of the usurious reservation ; whereupon he shall be discharged from the payment of it, unless the creditor, or, if there be two or more, one of them, will swear, that he has not directly or indirectly, wittingly taken or received more than the legal rate of interest.⁵

6th. The affidavit of a party as to the loss of a paper, in order to exclude any presumption that he may have it in his possession, or know where it is.⁶ The affidavit of a party for the purpose of procuring a continuance of an action, arresting a debtor, of a creditor to his petition to defend a suit in which an attachment has been made prior to that in a suit in which he is plaintiff, is also received.⁷

7th. In actions against common carriers for the loss of baggage by the carrier, the plaintiff's oath is allowed to prove the contents of the trunk, or other thing, containing his wearing apparel. The principle,

¹10 Maine 9.

²14 Maine, 208.

³4 Mass. 455.

⁴R. S. ch. 35, sec. 3.

⁵R. S. ch. 69, sec. 3—Act. of 1846, ch. 192.

⁶8 Pick. 277—Ib. 390.

⁷R. S. ch. 148, sec. 2—Ib. ch. 115, sec. 114.

in a case in which there was proof that the trunk had been broken open and rifled of its contents, has been applied to articles other than wearing apparel.¹

The rule which we have been considering is only, that parties to the record shall not be *allowed* to testify in their own favor, and shall not be *compelled* to testify against themselves. If, however, they choose voluntarily to do the latter, it seems they may be allowed so to do, not, however, without the consent of all the parties to the record.²

When one of several defendants is defaulted, he may be made a witness for the others in torts, but not in action on contracts.³

And in all cases, the party shall not be permitted to have the benefit of his own oath, except where the oath is administered in court. His deposition, therefore, in any of the foregoing cases, cannot avail him.⁴

11. Akin to the objection that the witness is a party to the record, is the objection that he is interested; and much that has already been said under the former head may be repeated under this. But one may be a party to the record, and yet have no interest in the event of the suit, having a bond of indemnity; and nothing is more common than for persons other than the parties to the record to be *interested* in the suit. A party to the record can never be a witness, unless he comes within some of the exceptions, while the objection to the admissibility of a witness on the ground of interest may be removed.

It must be some legal, certain, and immediate pecuniary interest in the event of the suit, however small. It must be real, and not merely apprehended, or honorary. It may be a direct interest in the result of the suit, or an interest in some subsequent suit, in which the record in this may be used as evidence.⁵

In civil suits, interested witnesses may testify in the following cases:

1. When, being otherwise interested, they are made competent by statute.

2. The case of agents, carriers, factors, brokers, or servants, when called to prove acts done for their principals, *in the course of their employment*.

3. The case of a witness whose interest has been acquired after the party has become entitled to his testimony.⁶

¹26 Maine, 458—1 Maine, 27—1 Green. Ev. § 348, and note. ²2 Pick. 57.

³Ib. § 354.

⁴Ib. § 354.

⁵1 Green. Ev. § 355, 357.

⁶1 Green. Ev. § 356.

⁷Ib. § 411.

All the exceptions to the general rule in case of parties to the record, may be repeated under this head.

Where a witness is produced to testify *against his* interest, the rule does not apply, nor where he is equally interested on both sides.

The rule disqualifying a witness on the ground of interest, extends to the wife of an interested witness, where her evidence tends to discharge the husband from his liability.¹

III. If it be alleged that the witness be a person deficient in understanding, as an insane person, or an idiot, or a young child, it is the duty of the presiding magistrate to question him in order that he may ascertain whether his mind be indeed too imbecile to comprehend the nature of an oath, and feel its binding force. And if he shall be satisfied that this is the case, he will refuse to admit his testimony.

IV. The conviction of an infamous crime is a disqualification. It is a difficult point to determine precisely the crime which will render the perpetrator infamous. The rule is stated to be that the offence must be one "implying such a dereliction of moral principle, as carries with it a conclusion of a total disregard to the obligations of an oath." *Treason*, *felony*, and the *crimen falsi* are considered to be infamous offences.² Felony, under our law, includes murder, rape, arson, robbery, burglary, maims, larceny, and every offence punishable with death, or by imprisonment in the State prison.³ The *crimen falsi* includes forgery, and every species of fraud and deceit.⁴ Infamy does not, however, disqualify a person from taking the poor debtor's oath.⁵

But no person shall be deemed an incompetent witness, by reason of having committed any crime, unless he has been convicted thereof in this State; but the conviction of any person, in any court without the State, of a crime which, if he had been convicted thereof within this State, would render him an incompetent witness here, may be given in evidence to affect his credibility.⁶

V. Rules of public policy sometimes disqualify. Thus, an attorney shall not be compelled on the stand to divulge the secrets of his client, confided to him professionally.

And a wife cannot testify in a suit to which the husband is a party.

² 2 Pick. 308.

³ 1 Green. Ev. § 373.

⁴ R. S. ch. 167, sec. 2.

⁵ 1 Green. Ev. § 373.

⁶ R. S. ch. 148, sec. 40.

⁷ R. S. ch. 133, sec. 44.

And, indeed, this last rule is carried so far, as we have already seen, that the wife of an interested witness is excluded.

And a party to a negotiable note is not an admissible witness to impeach the note.¹

2. *Mode of restoring the Competency of a Witness.* When a witness is once disqualified by being a party to the record, his incompetency cannot be removed. So where the incompetency arises from his want of understanding, or from the rule of public policy, he can be restored to his competency only by the happening of events, which can hardly take place during the course of a trial. Where interest is the disqualifying circumstance, he may be restored by a proper release, given before the testimony has closed, or by a bona fide assignment, without recourse, of all his interest in the suit. What is such a release, depends, of course, on the nature of each suit.

If any person shall be disqualified to testify in any suit, by reason of having indorsed the original writ or process, or of being a surety in the recognizance of the appellant, or in a replevin bond, he may be discharged by order of the court, so as to be sworn as a witness, provided another sufficient indorser or surety be substituted in his stead, to be liable in like manner and to the same extent, as he would have been.²

A full pardon of one convicted of an infamous offence will restore his competency; a remission, merely, of the remainder of the punishment does not restore his competency.³

The fact of the pardon may be proved by a certified copy from the office of the Secretary of State.

If the objection be deficiency of understanding, or conviction of an infamous crime, it should be taken before the witness is sworn.⁴

And, in the last case, the party objecting must be prepared with the record of the conviction to prove the fact.⁵

But the objection on the ground of interest may be taken at any time in the course of the examination, when the facts to sustain the objection have come out.⁶

And that, although there has been an unsuccessful attempt to prove it.⁷

¹10 Maine, 247.

²1 Green. Ev. § 392, and note.

³24 Pick. 277.

⁴Howe's Pr. 254.

⁵17 Mass. 515.

⁶13 Mass. 381.

⁷6 Green. 364.

If the fact of interest was known to, or the knowledge of it within the reach of, the party against whom he is called upon to testify, the witness must be objected to before he is sworn and examined, or the objection will come too late.¹

Proof that a witness has confessed himself interested is not sufficient to disqualify him. But where it is proved that the party by whom the witness is introduced, has acknowledged him so interested, he ought not to be sworn.²

The mode of proving the interest of a witness is either by his own examination, or evidence *aliunde*. After making his election, the party objecting must proceed in the manner he has chosen, except that, where the evidence *aliunde* is rejected as inadmissible, his right to examine the witness again revives, and that he may introduce evidence *aliunde* to show a fact neither stated nor denied by the witness on his own examination.³

These objections all run to the competency of the witness, and, if sustained, operate to entirely exclude his testimony. There are other objections which, although they admit the testimony of the witness in the case, go to affect its credibility, as that the witness is a common prostitute,⁴ entertains certain religious opinions,⁵ that different statements have been made by the witness out of court, that the character of the witness for truth and veracity is bad, and similar objections in regard to character, &c., which it would be impossible to enumerate.

It is not necessary that the witness should be present when his character is impeached.⁶

As to the manner of administering oaths to witnesses, the statutes provide, that the deponent shall hold up his hand, unless he is a person who believes that an oath is not binding, if it is not taken in his accustomed manner.⁷ The usual form of oath is, "You swear that the evidence you shall give in the cause now in hearing, shall be the truth, the whole truth, and nothing but the truth—so help you God." But all persons are to be sworn, according to the peculiar ceremonies of their own religion, or in such manner as they may deem binding on their own consciences.⁸

¹8 Pick. 392.

²8 Mass. 488.

³1 Green. Ev. § 423.

⁴14 Mass. 388.

⁵Laws 1847, ch. 34—R.S. ch. 115, sec. 72.

⁶17 Mass. 160.

⁷R. S. ch. 115, sec. 73.

⁸1 Green. Ev. § 371—R. S. ch. 133, secs. 52, 53.

Every person conscientiously scrupulous of taking an oath, is required to make affirmation as follows: "I do affirm under the pains and penalties of perjury;" which is deemed of the same force and effect as an oath.¹

The court in ascertaining whether the form in which the oath is administered is binding on the conscience of the witness may inquire of the witness himself; and the proper time for making this enquiry is before he is sworn. An oath is binding, in whatever form, if administered in such form and with such ceremonies as the person himself may declare binding. Though the proper time for making inquiry of the witness as to the proper form of oath to be administered to him is before he is sworn, yet, if he is sworn in the usual form, without making any objection, he may be afterwards asked, whether he thinks the oath binding upon his conscience.²

In all cases of preliminary examination, as for the purpose of proving the execution of instruments, and also where a party is offered to prove original entries, the magistrate will swear or affirm the witness to make "just and true answers to such questions as shall be put to him relative to the matter in hearing."

When the witness is ignorant of the English language, the court will order an interpreter to be first sworn, "truly to interpret between the court and the witness." The oath should then be administered to the witness in English, and interpreted to him by the sworn interpreter, as it is pronounced by the court.³

OF RECORD EVIDENCE.

The records and proceeding of any court of another State, or of the United States, are admissible in evidence in all cases in this State, when authenticated by the attestation of the clerk, prothonotary or other officer, having charge of the records of such court, with the seal of such court annexed.⁴

The constitution of the United States provides that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and power is given to congress to prescribe the manner in which such acts, records and proceedings may be

¹R. S. ch. 115, sec. 74.

²1 Green. Ev. § 371.

³4 Mass. 81—5 Mass. 225.

⁴R. S. ch. 133, sec. 45.

proved, and the effect thereof.¹ The law of congress prescribing the manner in which such records must be proved, requires that the judge, chief justice, or presiding magistrate shall certify that the attestation of the clerk or other recording officer is in due form.²

The printed copies of all statutes, acts and resolves of the State, whether of a public or private nature, which shall be published under the authority of the government, shall be admitted as sufficient evidence thereof in all courts of law, and on all occasions whatsoever.³

Printed copies of the statute laws of any other of the United States, or of the territories thereof, if purporting to be published under the authority of the respective governments, or if commonly admitted and read as evidence in their courts, shall be admitted in all our courts of law, and on all occasions, in this State, as *prima facie* evidence of such laws.⁴

The unwritten law of any other of the United States, or of the territories thereof, may be proved as facts by parol evidence, and the books of reports of cases, adjudged in their courts, may also be admitted as evidence of such law.⁵

The existence, and the tenor or effect, of all foreign laws, may be proved as facts, by parol evidence; but if it shall appear that the law in question is contained in a written statute or code, the court may, in their discretion, reject any evidence of such law, that is not accompanied by a copy thereof.⁶

Copies of the records of the courts of our own State, duly attested, are admissible in evidence.⁷

The protest of any foreign bill of exchange, or promissory note or order, duly certified by any notary public, under his hand and official seal, is made legal evidence of the facts stated in the same.⁸

Official registers, or books kept by persons in public office, in which they are required by statute, or by the nature of their office, to write down particular transactions, occurring in the course of their public duties, and under their personal observation, are admissible in evidence.⁹ When the books themselves are produced, they are received without further attestation. But they must be accompanied by proof

¹Const. U. S. art. iv. sec. 1.

²Act of 1790, ch. 38—Act of 1804, ch. 409.

³R. S. ch. 133, sec. 46.

⁴Ib. sec. 47.

⁵Ib. sec. 48.

⁶Ib. sec. 49.

⁷16 Maine, 18.

⁸R. S. ch. 44, sec. 12.

⁹1 Green. Ev. § 453.

that they come from the proper depository. Where the proof is by copy, an examined copy, duly made and sworn to by any competent witness, is always admissible. Such witness may be either the person appointed by law to furnish copies, or, it seems, any officer having legal custody of the book, and whose duty it is to keep the original.¹

OF THE POWER TO COMPEL THE ATTENDANCE OF WITNESSES.

Until recently, justices of the peace have had no power to compel the attendance of witnesses in actions pending before themselves; but now, if any person duly summoned and obliged to attend as a witness in any cause or matter pending before any justice of the peace, or judge of any municipal or police court, shall fail so to do, without any reasonable excuse, such person shall not only be liable to the aggrieved party for all damages by him sustained by such default, but such justice, or judge, shall have power to issue a *capias*, directed to the proper officer, to apprehend such witness, and bring him before such justice or judge, and to fine him at discretion, not exceeding the sum of twenty dollars, and order him to pay the costs of such attachment, and commit him until the same and all costs attending such commitment shall be paid. If such witness, being present before such justice or judge, shall refuse to answer such questions as may be propounded to him under the direction of such justice or judge, he may fine such witness at discretion, not exceeding twenty dollars, and commit him until the same and all costs are paid.² The form for a *capias* to compel the attendance of a witness will be found in a subsequent part of this volume.

The plaintiff having opened his case, and put in his evidence, and the defendant having cross-examined the plaintiff's witnesses, the defendant next proceeds to open his own case, and put in his evidence, the plaintiff, in his turn, having the same right of cross-examination. The plaintiff then puts in his rebutting testimony, and if the defendant has any still farther in reply, he follows with it; after which the closing arguments are made, first for the defendant, then for the plaintiff. The magistrate will then, upon the issue thus joined, and the facts thus presented, proceed to render his *judgment* in the case, according to his best knowledge of the law.

¹1 Green. Ev. § 485.

²Act of 1847, ch. 9.

CHAPTER IX.

OF THE JUDGMENT.

THE judgment is the disposition which the magistrate makes of the matter before him, and may be either interlocutory, (as upon a motion to dismiss, that the motion be not granted,) or final. If the disposition of the case is taken out of the hands of the magistrate, whether by the act of the parties, as by entering "neither party," (by which is meant that neither party will prosecute or defend farther,) or by act of law, as when it appears that the title to real estate is concerned, or in replevin that the damages demanded exceed twenty dollars, or property in the beasts is in question and their value exceeds twenty dollars, and one party requests the removal of the action, he will render no judgment, but simply enter the facts in his record.

The judgment varies according to the nature of the action, and of the determination itself.

I. PLEAS IN ABATEMENT AND MOTIONS TO DISMISS.

The judgment on these, if for the plaintiff, is interlocutory, unless issue is taken on a question of fact, in which case it is final.¹

If for the defendant, it is final in all cases—that the writ be abated, or the action dismissed. As to when costs are given, and when not, see chapter on costs.

II. DEFAULT.

If any person duly served with process, fail to appear and answer thereto, his default shall be recorded, and the charge against him in the declaration shall be taken to be true ; and upon such default, and also when the plaintiff maintains his action upon trial, the justice shall award and enter judgment for such sum, not exceeding twenty

¹18 Maine, 820.

dollars, as he shall upon inquiry find the plaintiff is entitled to recover, with costs.

In actions where the damages are liquidated or certain, this may be done from the contract produced, or the plaintiff's bill of particulars. Where they are unliquidated or uncertain, there must be an *ex-parte* hearing for that purpose.

In entering judgment on default, the magistrate will look well to it that the cause of action which may be filed by the plaintiff in his bill of particulars corresponds with his declaration, as that, for instance, he do not file a claim in tort, under a declaration in assumpsit.

III. NONSUIT.

Judgment is given upon nonsuit when the plaintiff fails to prosecute his action. This includes also the judgment on a complaint for costs by the defendant, where the plaintiff fails to enter the action. In either case it is a judgment only for costs.

IV. TRIAL.

If the plaintiff enters his action, and the defendant appears, and the parties proceed to trial, then judgment will be rendered on the issue joined, and the facts proved, whether in favor of the plaintiff, or of the defendant. And the justice should render his judgment only on the facts legally proved. He has no right to make himself a witness, and take into consideration, in forming his opinion, facts within his own cognizance, but of which there is no evidence in the case.¹

If he find for the plaintiff, he will assess damages, for which he will give judgment, as also for costs. If he find for the defendant, he will give judgment for costs alone, unless, in case of set-off filed, he shall find that the balance of account is in favor of the defendant, in which case he will give judgment for such balance with costs.

V. TENDER, AND OFFER TO BE DEFAULTED.

In all cases of tender pleaded and proffered, and of offer to be defaulted, the plaintiff may, as we have already seen, elect whether he will accept the tender, or offer, or proceed with his action.

¹10 Johns. 250.

If the proffert be made upon a previous tender, and the plaintiff elect to accept the tender, costs will be taxed up to the time of the tender, which should be paid into court by the defendant, who may then take judgment against the plaintiff for costs from the time of the tender to the time of the judgment.

If there be no previous tender, and the plaintiff elect to accept the sum proffered, costs should be taxed up to the time the money is brought into court, and then paid by the defendant, and "*neither party*" entered in the action. Because in theory the defendant is supposed to tender cost, as well as debt, and if the plaintiff accepts the sum tendered in full satisfaction, there remains nothing upon which to render judgment.

If, however, the plaintiff elect to proceed with his action, he does it at his peril. And if the magistrate shall find that no more is due than the sum proffered, he will render judgment for the defendant for costs from the time of the tender, if a tender has been made, or from the time of the proffert.¹

But if the justice is satisfied that the tender is too small, he should render judgment for the plaintiff for the overplus, however small, and his costs.

But he should not render judgment for a less sum than the amount proffered, unless the defendant show some fraud or deceit practised upon him.²

When the defendant has proffered without a previous tender a certain sum as the full amount of damages, and has prayed that his costs may be taxed by the court, but has not paid in his costs, and the plaintiff elects to proceed with his action, and the magistrate finds that no more is due than the sum tendered, the question has been raised whether the plaintiff is entitled to his execution for the costs up to the time of the proffert. The question is yet an open question, the rule of practice being unsettled. It may, however, be avoided, by having the costs in all cases taxed up to the time of the tender, and requiring them to be paid in before any disposition is made of the action; which may undoubtedly be done.

When an offer is made to be defaulted, the offer is, as we have seen, for a specified sum as damages. If the offer is accepted, judgment is

¹5 Mass. 369—Howe's Pr. 406.

²Howe's Pr. 407.

rendered for such sum as damages, and for costs up to the time when it was made. If the offer is not accepted, and the plaintiff proceed to trial, and recover no greater sum for his debt or damages, up to the time when the offer was made, the defendant recovers his costs from the time of such offer, and they are set off against the sum so offered.

VI. IN OTHER MATTERS.

In replevin for beasts distrained or impounded, the judgment for the plaintiff is for damages and costs; for the defendant, for such sum, as shall be found to be due from the plaintiff, for the penalty or forfeiture, or for the damages for which the beasts were impounded, together with all the legal fees, costs, and expenses, incurred by reason of the distress, and also the costs of the action of replevin; or, instead of such judgment, the justice may in his discretion enter judgment for a return of the beasts to the defendant, to be held by him for the original purpose, irrepleviable by the plaintiff, and for the defendant's damages for the taking thereof by the replevin, and for his costs of the suit.¹

In replevin for goods unlawfully taken, or unlawfully detained, the judgment for the plaintiff is for damages and costs; for the defendant for a return of the goods, with damages for the taking thereof by the replevin, with his costs, and a writ of restitution thereupon accordingly.² If the goods when replevied were taken in execution, or if they were attached, and judgment be afterwards rendered for the attaching creditor, and if in either case, the service of the execution be delayed by means of the replevin, the damages to be assessed for the defendant, in case of a judgment for a return, shall not be less than twelve per cent by the year on the value of the goods, for so long time as the service of the execution shall be delayed.³

In forcible entry, the judgment for the plaintiff is possession of the demanded premises and costs; for the defendant costs. The forms of the various judgments will be found in the subsequent chapter on records.

When any person is adjudged to be a trustee in the original suit, it shall not be necessary to specify in the judgment the sum for which he is chargeable; but if, upon a writ of scire facias against him, it shall

¹R. S. ch. 180, sec. 4.²Ib. sec. 16.³Ib. secs. 15, 11.

appear that he is chargeable as a trustee, the sum, for which he is chargeable, shall be expressed in the judgment.¹

When an executor or administrator is adjudged a trustee in that capacity, the judgment is against the goods and effects of the deceased in his hands.²

In case of the death of the defendant, pending the suit, and the suggestion of the fact, the magistrate cannot give judgment till after issuing a citation.³

If the executor or administrator shall not appear, at the time mentioned in the citation, after the same has been served upon him, according to the order of court, he shall be nonsuited, or defaulted, and judgment may be rendered against him ; but in such case, not having taken upon himself the prosecution or defence of the suit, he shall not be personally liable for any costs of the action, but judgment shall be rendered for such costs against the estate of the deceased in his hands.⁴

When a judgment for costs shall be rendered against an executor or administrator, in an action commenced by or against him, or in any action commenced by or against the testator or intestate, wherein the executor or administrator has appeared and taken upon himself the defence of the action, he shall be personally liable for costs ; but in the latter case only for costs after he took upon himself the prosecution or defence. When the judgment against the executor or administrator is for costs only, the execution shall be awarded against his body, goods and estate, as if it were his own debt ; when for debt or damages, and costs also, an execution for the debt shall be awarded against the goods and estate of the deceased in the hands of the executor or administrator, and another execution for the sum due for costs, against the goods of the executor, and also his body, as if it were his own debt.⁵

In case of *scire facias* on suggestion of waste against an executor or administrator, the judgment, if he do not appear after due notice, is against him personally, for the amount of the waste, if it can be ascertained.⁶

In actions of trespass on property, if the magistrate is satisfied the trespass was committed wilfully, a record is to be made by him of that fact, and when execution issues, a memorandum is to be made on the

¹R. S. ch. 119, sec. 72.

²Ib. sec. 49.

³R. S. ch. 120, sec. 13.

⁴Ib. secs. 13, 14.

⁵Ib. secs. 2, 3, 4.

⁶Ib. sec. 6.

margin, that the judgment was rendered for a trespass committed wilfully.¹

A judgment can never be awarded by a justice for more than twenty dollars, exclusive of costs.

As to cases in which judgment may be rendered for costs, and for rules for taxation of costs, see chapter xi.

¹R. S. ch. 115, sec. 109.

CHAPTER X.

OF APPEAL, RECOGNIZANCE, EXECUTION, AND CERTIORARI.

I. APPEAL AND RECOGNIZANCE.

ANY party aggrieved by the judgment of a justice of the peace, may appeal to the next District Court in the same county, and may enter such appeal at any time within twenty four hours, Sundays not included, after the judgment is rendered by the justice ; in which case, no execution shall issue, and the case shall be entered, tried, and determined in the District Court in like manner as if it had been commenced there.¹

The appellant shall, before the allowance of his appeal, recognize with sufficient surety or sureties to the adverse party, if required by him, in a reasonable sum, with condition to prosecute his appeal with effect, and to pay all such costs, as may arise after the appeal.²

The appellant shall produce at the District Court a copy of the record, and of all the papers filed in the case, except that when depositions, or other written evidence or documents, are filed, the originals shall be produced at the District Court instead of copies ; and if the appellant shall fail to produce such papers, and enter and prosecute his action, the court may, on the complaint of the adverse party, affirm the former judgment and costs.³

It has been holden, on a statute of Massachusetts similar in its wording, in regard to appeal from the Court of Common Pleas to the Supreme Judicial Court, that the right of appeal given must be confined to cases of final judgment, and should not be extended to any interlocutory judgment.⁴

And therefore that a refusal to receive a plea in abatement, or dismiss an action cannot be appealed from.⁵

But an order whose effect is to terminate the suit may be appealed from, as an order dismissing an action.⁶

¹R. S. ch. 116, sec. 9.

²Ib. sec. 10.

³Ib. sec. 11.

⁴5 Mass. 194.

⁵4 Mass. 107—4 Pick. 89.

⁶11 Mass. 275, 276.

When an action commenced before a justice has been defaulted, no appeal lies to the District Court.¹

In trustee process, either the trustee or plaintiff may appeal.²

In replevin, either party may appeal from the final judgment of the justice, as in other civil actions.³

In forcible entry and detainer, either party may appeal from the judgment of the justice, upon issue joined, the plaintiff recognising as in other cases of appeal, and the defendant to pay all intervening damages and costs, and also such reasonable intervening rent for the premises, as such justice shall adjudge, in case his judgment shall not be reversed on such appeal. If the defendant files a brief statement of title in himself, or some other person under whom he claims the premises in question, he is required to recognise in the same manner, excepting that the condition to pay rent, is to be to pay reasonable intervening rent; and the plaintiff is also, in such case, required to recognise, with the usual conditions. If in this last case either party refuses to recognise, the justice shall enter judgment, as, in case of nonsuit or default, against the party so neglecting or refusing.⁴

As to the mode of claiming the appeal, and entering into recognizance, it is sufficient to say, that the appellant appears at any time within twenty-four hours after judgment, with his sureties, before the justice, claiming his appeal, and the justice, if satisfied with the sureties, thereupon verbally takes their recognizance for the entry and prosecution of the appeal, and such other condition as may be. It is not necessary, however, that the party appealing should personally enter into recognizance. If done by sureties, it is equivalent to doing it "with sureties."⁵

The magistrate will transcribe at length the original recognizance, (a form for which may found hereafter,) which is carried up with the papers to the appellate court; and will transcribe also a copy of the recognizance into his records.

He will also certify his fees on the copies, for recognizance, copies, and for travel for returning the papers to court, making each charge separately. The amount of these items may be found in the chapter on Fees and Costs.

¹28 Maine, 102.

²12 Pick. 414—28 Maine, 455.

³R. S. ch. 130, sec. 6.

⁴R. S. ch. 128, sec. 4.

⁵4 Maine, 62.

II. OF EXECUTION.

Executions are either original or *alias* executions.

I. *Of original execution.* When it may be issued and made returnable.

It is not usual for magistrates to issue execution till twenty four hours, Sundays not included, after judgment. In a case, however, where the judgment is on default, there is nothing to prevent the issuing execution immediately upon judgment ; for in such cases, as we have seen, the defendant cannot appeal, and there seems to be no provision of law requiring delay in the issuing execution excepting that which gives the defendant twenty four hours for entering his appeal.¹

No first execution can be issued after the expiration of one year, from the time judgment is entered, unless where the defendant, being an inhabitant of the State, is absent therefrom, and it does not appear that he had actual notice of the suit, or has returned to the State, in which case the court may enter judgment on default ; but execution cannot issue on such judgment within one year after such default, unless the plaintiff shall give bond to the defendant, with one or more sureties, in a sum equal to double the amount of the damages and costs, with condition to repay said amount to the defendant, if the judgment shall be reversed upon review.²

Executions issued by a justice of the peace shall be made returnable in three months from the day they were issued.³

1. *Of the form of the execution.* The issuing of execution is, as we have already seen, a ministerial process, and therefore the magistrate will look well to it, for his own protection, that he conforms to the letter of the law. It should agree with the judgment, in all respects.⁴

Where there are two or more plaintiffs or defendants, and one or more of them dies after judgment, and before execution, execution may be had for or against the survivors. But as the execution must agree with the judgment, it must be sued out in the joint names of all the plaintiffs or defendants, unless a motion be made to the court for the change, in which case it may issue in the name of the survivor.⁵

¹R. S. ch. 116, sec. 9—28 Maine, 102. ⁴2 Conn. 462.

²R. S. ch. 115, sec. 104.

³Ib. sec. 108.

⁵9 Mass. 18, 19, 160—2 Saund. 72, K.

But when a single plaintiff or defendant dies, there is no authority to issue execution, and the proper course is, to resort to a writ of *scire facias*, which may be had by or against his personal representatives.¹

And so in case of the marriage of a *feme sole* plaintiff after judgment and before execution.²

If for a debt, it should be for the amount found due, and interest from the time of rendition of judgment, and if for any thing else, for the matter adjudged; and in all cases of judgment for costs, the justice ought personally to examine the taxation, that it be not too large. If execution be issued against those privileged from arrest or imprisonment, on civil process, the command to take the body should be stricken out; or if the judgment is for less than ten dollars, or the defendant has successfully disclosed before final judgment, upon the same debt;³ and to this point, the magistrate should give most particular attention, as for every illegal arrest made under such command, he is personally responsible.

We have already considered, in a former chapter, who are and who are not exempted from arrest, to which we refer.

Too much can hardly be said, of the necessity of great care in the performance of this part of a magistrate's duty. This is the final mandate which is to carry into execution the behests of the law; and deserves more attention and care, than, we fear, has been often given to it.

The execution may be directed to any officer who might serve the original writ, and should, like an original writ, bear the seal as well as the signature of the justice.

When he has signed the execution, the justice should preserve some memorandum of it, if for no other reason, at least to guard him against issuing an *alias* after the time for one has run out. Perhaps the most convenient form for doing this is to enter in his docket the amount of the debt and damage, the amount of the costs, and of the writ of execution, and the date of the execution; and also to make a minute of the same on the back of the original writ, thus—

| | | | | | |
|-------------------|---|---|---|----|-------|
| Damages, | - | - | - | \$ | |
| Costs, | - | - | - | \$ | |
| Execution issued, | | | | | 185 . |

¹ 16 Mass. 193.—R. S. ch. 120, sec. 10.

³ R. S. ch. 148, secs. 2, 15, 32.

² 2 Saund. 72, k. 1.

A magistrate must sometimes issue two separate executions in the same suit—thus, in the case of an executor or administrator who has taken upon himself the defence of a suit, when the judgment is for debt or damages, and for costs also, an execution or for the debt damages shall be awarded against the goods and estate of the deceased, in the hands of the executor or administrator, and another execution, for the sum due for costs, shall be awarded against the goods and estate of the executor or administrator, and also against his body, as if it were for his own debt.¹ So, too, in case of tender, it may be that there shall be execution against both plaintiff and defendant.

In actions for trespass on property, we have before stated, that it is the duty of the magistrate to inquire and determine whether the trespass was committed wilfully. If the magistrate so determines, a memorandum is to be made by him on the margin of the execution, that the judgment was rendered for a trespass committed wilfully.²

If a magistrate is called upon, under the provisions of statute, to issue execution on a record of a deceased justice, brought before him and transcribed upon his own book of records, the form of execution must be changed from the usual form, by the justice, as circumstances shall require.³ So if he shall have occasion to issue execution against persons or property out of his own county.

2. *Of alias executions.* An *alias*, or *pluries* execution may be issued within three years next after the day, on which the last preceding execution was returnable, and not afterwards.⁴ If not issued within that time, the plaintiff must sue out *scire facias*, or, what is more common and convenient, bring an action of debt upon the judgment.⁵

No alias execution should be issued, till the return of the preceding one.⁶ If the preceding execution has been put into an officer's hands, it should appear, by his return that it is "wholly unsatisfied," or "satisfied in part only," as the fact may be; and if it has never been put into an officer's hands, that fact, as well as the fact whether it has been satisfied at all, and if so, for how much, should appear either by a certificate of the plaintiff himself, or of the attorney employed by him in the suit.⁶

¹R. S. ch. 120, sec. 4.

²R. S. ch. 115, sec. 109.

³R. S. ch. 116, secs. 19, 20, 21, 22.

⁴R. S. ch. 115, sec. 105.

⁵R. S. ch. 115, sec. 106.

⁶Howe's Pr. 275, 276.

The execution, we have said, should follow the judgment. Therefore it follows, that when an *alias* issues, it should issue for the amount without interest or the unsatisfied judgment ; or for the balance remaining after deducting the amount received from the amount of the judgment, when the judgment has been satisfied in part, without interest either on the judgment or payment.

Whenever a magistrate issues an *alias*, he should make a memorandum, similar to the memorandum made when the original execution is sued out.

It will be convenient, in this connection, to point out the manner of issuing execution upon the records of deceased justices.

Whenever any justice shall die, after having given judgment in a cause, but before such judgment is satisfied, it is in the power of any justice of the peace of the same county, on complaint of the creditor, to issue a summons to the person, in whose possession the record of such judgment is, directing him to bring to him the same record ; and if such person shall contemptuously refuse to produce the same, or to be examined respecting it on oath, the justice may commit him to prison, as punishment for the contempt, until he shall submit to such examination, and produce the record.¹

When such record is produced, the justice should transcribe it upon his own book of record, returning the original to the person producing it.²

On such transcribed record, the justice may issue execution, in the same manner as if judgment had been rendered by himself, changing the form as circumstances may require ; but no such execution shall issue after the expiration of one year from the time the judgment was rendered, unless after *scire facias*.³

Any justice, whose commission has expired, and shall not be renewed, is authorised to issue and renew execution on any judgment by him rendered while in commission ; but this power continues for two years only after his commission shall have expired.⁴

III. OF CERTIORARI.

When a magistrate acts in processes out of the course of the common law, and no appeal is given to the party aggrieved, he may have, upon

¹R. S. ch. 116, sec. 19.

²Ib. sec. 20.

³Ib. sec. 22.

⁴Ib. sec. 28.

his showing sufficient cause, for the more complete furtherance of justice, a writ of *certiorari* issuing from the supreme judicial court, directed to the magistrate by whose decision he feels himself aggrieved, commanding him to certify and return the records in the cause.

With the cause which may or may not be sufficient for the issuing of this writ, or with the proceedings under it, we have nothing to do. Our only object is, to point out the course which the magistrate is to pursue when he finds himself thus made a party to the suit in which he before sat as judge. The writ of *certiorari* not being a writ of right, before issuing it the court will order notice to the adverse parties to appear and show cause why it should not issue. The justice will remember that, though the nominal party on the record, he has no interest in the suit, and is neither bound nor ought to take upon himself the defence of the case. It is a matter immaterial to him, whether his judgment is to stand or fall.

If on this preliminary hearing, the court are satisfied that the writ should issue, they will issue a writ directed to the justice, commanding him to distinctly and openly send to them the record and process in the case, with all things touching them, under his seal, together with the writ of *certiorari*, at a time therein mentioned. It then becomes the duty of the justice to obey the precept of the writ, which he will do by annexing a certified copy of the record, of the original writ or complaint, and also of every paper filed in the case, to the writ of *certiorari*, and making return on said writ, *under his seal*, that by virtue of the precept within the same, he thereby returns the writ of *certiorari*, together with certified copies of the record and process in the case, and all things touching them. After this he has performed all his duty, and his connection with the case ceases. He should proceed no further with it.

CHAPTER XI.

OF THE FEES OF THE JUSTICE AND OF COSTS IN CIVIL ACTIONS.

I. FEES OF JUSTICES OF THE PEACE.

For every blank writ of attachment and summons thereon, or original summons, ten cents.

For every subpoena, for one or more witnesses, ten cents.

For the entry of an action, or filing a complaint in civil causes, including filing of papers, swearing of witnesses examining, allowing and taxing the bill of costs, and entering up the judgment and recording the same, thirty cents.

For the copy of a record, or other paper, at the rate of twelve cents a page.

For a writ of execution, fifteen cents.

Taking a recognizance to prosecute an appeal, including principal and surety, twenty cents.

For taking a deposition, affidavit, or disclosure of a trustee, in any cause not depending before himself, twenty cents ; for writing the same, with the caption, and for the notifications to the parties and witnesses, at the rate of twelve cents a page.*

For taking a deposition in perpetual memory of the thing, the same fees to each justice, as in taking other depositions.

Administering an oath in all cases, except on a trial or examination before himself, and to qualify town or parish officers, and a certificate thereof, twenty cents, whether administered to one or more persons at the same time.

Taking the acknowledgment of a deed, with one or more seals, provided it be done at one and at the same time, and certifying the same, seventeen cents.

Granting a warrant of appraisement in any case, and swearing appraisers, thirty two cents.

*The word "page" shall mean two hundred and twenty-four words. R. S. ch. 151, sec. 23.

Recognizance of debt and recording, forty two cents.

Drawing a rule for submission to referees, and acknowledging the same, thirty three cents.

Writ to remove a nuisance, thirty three cents.

Calling a meeting of any corporation, fifty cents.

For an examination of a debtor, under the laws for the relief of poor debtors, fifty cents ; for interrogatories proposed by the creditor or his attorney, and answers, to be paid by the creditor, twelve cents a page.

For travel on any official duty, at the rate of fifty cents, for every ten miles, in going and returning.

In all cases, where the attendance of two or more justices is required, each of them shall be entitled to the fees prescribed for all services rendered by him personally.¹

Except when otherwise expressly provided, the fees of the judge of any municipal or police court, shall be taxed in the same manner, and at the same rate, as the fees of justices of the peace, so far as applicable. And whenever any such judge shall receive a stated salary for his services from the treasury of the county he shall account under oath to the treasurer of said county, for all fees accruing to him in said capacity, towards his salary.²

In all cases where no other rule is provided, the allowance to public officers for any copies, which they are by law required to furnish, shall be at the rate of twelve cents a page, including the attestation of the same ; for affixing an official seal to the same, when necessary, twenty five cents more.³

In cases of appeal to justices under the acts relating to insane persons, the justices deciding an appeal, are entitled to receive for their services two dollars a day, and ten cents a mile for travel, to be paid by such party as they may determine ; and in cases where, under said acts, they have original jurisdiction, they shall charge the same fees as they would by law be entitled to charge on a criminal examination, to be paid by the city, town, or person liable in the first instance to pay for committing to and support in the hospital.⁴

¹R. S. ch. 151, sec. 1.

²Ib. sec. 2.

³Ib. sec. 23.

⁴Act of 1847, ch. 33, sec. 17.

For certifying and solemnizing a marriage, one dollar and twenty-five cents.¹

In all cases, not expressly provided for, the fees of all public officers, for any official service, shall be at the same rates, as are prescribed above for like services.²

It may be well to state here, that in all cases carried from before a justice of the peace, or municipal or police court, to a higher tribunal, all depositions and other original papers, excepting the writ, complaint, summons, citation or other process by which the action is commenced, and the return of notice by the officer or other person serving the same, and the pleadings, shall be certified by the justice, recorder, or clerk, and carried up without leaving copies, unless for special reasons otherwise ordered by the court, having the original jurisdiction.³

Every officer, whose fees are regulated by law, is required to keep a printed or legibly written list and description of such fees, exposed to public view in his stated place of business, if he have one. And every officer, upon receiving such fees, shall, if required by the person paying the same, make out a particular account of such fees in writing, specifying for what they accrued, upon pain of forfeiting to the party paying such fees, treble the sum paid.⁴

II. OF THE TAXATION OF COSTS.

1. *When recoverable.* In all actions, the party prevailing is entitled to his legal costs.⁵ So if a plaintiff fails to enter and prosecute his action, the defendant has judgment for his costs.⁶

When a writ is abated or dismissed, the defendant, as the prevailing party, is entitled to costs, unless in some cases, the action is dismissed, or the writ abated, for want of jurisdiction.⁷

Where a writ is bad on the face of it, and it is manifest that the court has no jurisdiction, so that the proceedings may be quashed on motion, no costs are allowed.⁸

But it must be a clear case, where no judgment would be rendered although the defendant should not appear. In all cases where the want of jurisdiction does not manifestly and clearly appear on the face

¹R. S. ch. 151, sec. 19.

²Ib. sec. 25.

³Ib. sec. 24.

⁴Ib. secs. 26, 27.

⁵R. S. ch. 115, sec. 56.

⁶R. S. ch. 116, sec. 8.

⁷6 Pick. 364.

⁸23 Pick. 111.

of the writ, and the question of jurisdiction is a fair subject of discussion, and for the decision of the court, the defendant is entitled to costs.¹

When costs are recoverable in case of tender or bringing money into court, or offer to be defaulted, has been considered under the head of "Tender," &c.

When a demand has been filed by the defendant in set-off, if no balance is found due either party, neither recovers costs; if a balance is found due defendant, he recovers his costs.²

When a plaintiff shall, at the same court, and at the same term, bring divers actions against the same party, which might have been joined in one, or shall bring more than one suit upon a joint and several contract, he shall recover costs in only one of such actions, unless the court shall certify, that there was good cause for commencing them.³

When a judgment for costs has been rendered against a plaintiff, on nonsuit or discontinuance, and a second suit for the same cause shall be brought before the costs of the former suit shall have been paid, the court shall, on the same being made to appear, stay all proceedings until such costs shall be paid, and may dismiss the suit, unless they are paid at such time as the court shall appoint.⁴

No costs are allowed the plaintiff in an action upon a judgment, on which an execution might, at the time of commencing such action, have been issued and duly served on the judgment debtor; but this provision does not apply to a trustee process, founded on such judgment.⁵

Costs may be imposed or withheld, in the discretion of the court, as a condition of granting an amendment or continuance.⁶

When a suit is brought in the name of the State, but for the use and benefit of any private person, his name and place of residence are required to be indorsed on the writ, and if the suit is not maintained, judgment for defendant's costs shall be rendered against such person, and execution issued in like manner as if he were plaintiff on record.⁷

2. *Against whom.* In an action by an infant plaintiff suing by his next friend, if the defendant prevails, he will be allowed costs against the infant.⁸

¹5 Met. 240—7 ib. 591.

²R. S. ch. 115, secs. 45, 46.

³Ib. sec. 98.

⁴Ib. sec. 89.

⁵Ib. sec. 96.

⁶Ib. sec. 98.

⁷Ib. sec. 90.

⁸1 Pick. 275.

When an action is brought for the recovery of a debt, and the defendant has been or shall be summoned as the trustee of the plaintiff, if the amount disclosed by the trustee shall be equal to the sum recovered in the action, the trustee shall be liable to no costs in such action, subsequent to the service of the trustee process upon him.¹

As to costs by and against executors and administrators, see previous pages.

In actions *ex contractu*, the plaintiff must prevail against all the defendants, to entitle him to costs against any. And if the defendants prevail, they take joint judgment, if there be more than one, against the plaintiffs jointly.²

But in actions *ex delicto*, it has been the invariable practice to allow several costs, whether part or the whole be acquitted, whenever the defendants plead severally.³

3. *Special proceedings—Trustee process.* When any person, summoned as a trustee, before a justice of the peace, appears at the return day, or at a subsequent day, the parties having agreed thereto, and submits himself to examination upon oath, and shall thereupon be discharged, he shall be allowed his legal costs. If, on such disclosure, he shall be adjudged trustee, he may retain the amount of his costs.⁴

When the plaintiff discontinues his suit against the principal or trustee he trustee shall be allowed his costs.⁵

When the debt recovered against the principal shall be a less sum than five dollars, the trustee shall be discharged, unless the judgment be so reduced by means of a set-off filed in the case.⁶

The action may be brought in any county in which any trustee, named in the writ, resides; and if brought in any other county, the action will be dismissed, and the trustee shall recover his costs.⁷

After service on the principal defendant, further service may be made upon any trustee, if the service be afterwards made upon the principal, but no costs shall be taxed for the plaintiff in such case, except for that last made.⁸

When one is adjudged trustee for specific articles, he has a lien upon them for his costs.⁹

¹R. S. ch. 119, secs. 13, 14.

²10 Pick. 231.

³1 Pick. 458.

⁴R. S. ch. 119, secs. 42, 90, 91.

⁵Ib. sec. 92.

⁶Ib. sec. 93.

⁷Ib. sec. 88.

⁸Ib. sec. 6.

⁹Ib. sec. 18.

If any person, belonging to the county in which the writ is made returnable, being summoned as trustee, shall neglect to appear and submit to examination on the return day, and having no reasonable cause to the contrary, he shall be liable to all costs afterwards arising in the suit, to be recovered and paid out of his own goods or estate, if judgment be rendered for the plaintiff; unless recovered out of the goods or effects in the hands of the trustee, and belonging to the principal.¹

When several trustees, resident in the county, where the action is pending, being summoned, shall neglect to appear, the judgment for costs shall be rendered against them jointly.²

If the person summoned as trustee is out of the State at the time the writ is served upon him, and if he appear at the first sitting of the court after his return, he shall be allowed for his costs and charges in the same manner as if he had appeared at the return day.³

When the plaintiff does not support his action against the principal, costs will be awarded against him, in favor of such persons summoned as trustees, severally, who have appeared and submitted to examination on oath; and several executions will issue accordingly.⁴

In case of discontinuance of the suit by plaintiff, no costs are to be awarded the trustee, unless he comes into court, and declares he had no property or credits of the principal in his hands, and submits himself to examination on oath.⁵

If a person is adjudged trustee, in the original suit, on default, and a writ of scire facias is sued out against him, the court shall render judgment against him for costs only, if, on examination on scire facias, he shall appear not to be chargeable. If he had been examined in the original suit, the court is authorized to render such judgment on scire facias, as law and justice require, upon the whole matter appearing on the new examination in the latter process.⁶

If any trustee, who has been defaulted on scire facias, shall have been examined in the original suit, judgment shall be rendered on the facts stated on his disclosure, or proved at the trial; but if it appear, that such person paid and delivered the whole amount, for which he

¹R. S. ch. 119, sec. 22.

²Ib. sec. 28.

³Ib. sec. 25.

⁴Ib. sec. 25.

⁵Ib. sec. 26.

⁶Ib. secs. 78, 79.

was chargeable as trustee, on the execution, issued on the original judgment, he is not liable for any costs on the *scire facias*.¹

If any person, summoned as trustee, shall have been prevented from appearing in the original suit, by absence from the State, or for any other reason deemed sufficient by the court, and a default be entered against him, he shall not be liable for any costs on the *scire facias* ; but, on his disclosure, the court may allow him his reasonable costs and charges, to be retained or recovered in like manner as if he had appeared in the original suit.²

If, during the pendency of an action, the defendant is summoned as the trustee of the plaintiff, and before final judgment is rendered in the first suit, the defendant in that suit shall be adjudged trustee in the other, and shall pay thereon the money demanded in the first suit, or any part of it, the fact shall be stated on the record of the first suit, and judgment therein shall be rendered for the costs due to the plaintiff, and for such part of the debt or damages, if any, as shall remain due and unpaid.³

If a person, summoned as trustee, dies before judgment in the original suit, the plaintiff may take judgment against him by default, as if he were living, and his executor or administrator shall pay, on the execution, the amount which he would have been liable to pay the principal defendant. If the executor or administrator does not voluntarily so pay, the plaintiff may proceed against him by writ of *scire facias*, in which case, if he is discharged, he may recover costs or not, at the discretion of the court.⁴

The costs for trustees are to be taxed in the same manner, as for parties in civil actions, where issue is joined for trial.⁵

Bail. When bail is taken on mesne process, and there shall be a return on the execution issued on the judgment, that the principal is not found, the justice may issue *scire facias* thereon against the bail, and if no sufficient cause is shown to the contrary, he may render judgment for the debt and costs recovered, with interest from the time judgment was rendered against the principal.⁶

If the bail shall at any time before final judgment in the original suit is rendered, or upon the return of the *scire facias* and before final

¹R. S. ch. 119, sec. 77.

²Ib. sec. 86.

³Ib. sec. 66.

⁴Ib. secs. 46, 47.

⁵Ib. sec. 16.

⁶R. S. ch. 118, sec. 18.

judgment thereon, bring the principal before the justice, and procure the attendance of an officer, to receive the principal, the justice shall make a record of such surrender, and shall order him into the custody of the officer—and on payment of costs arising upon the scire facias, the bail shall be fully discharged. The officer in such case shall be allowed the same fees as for arresting and committing the defendant on mesne process.¹

The officer holding the execution against the principal, having notified the bail personally, or by leaving a notice by him signed, at the usual place of abode of the bail, if living in his county, at least fifteen days before the expiration thereof, and certified that he cannot find the principal debtor, nor property wherewith to satisfy the execution, is entitled to receive of the bail the usual fee for the service of a writ, and for travel from the dwelling-house of the officer to the dwelling-house of the bail. The officer shall minute in his notice the amount of the fees, which the bail shall pay in twenty days, unless, one day at least before the execution is returnable, the bail shall produce and deliver to the officer the principal debtor.²

4. *Of the mode of taxing costs.* In practice, the bill of costs is made out by the party prevailing, or his attorney. The magistrate will, of course, carefully examine it, before making up judgment and issuing execution.

If any party wishes to be heard in costs, he gives the magistrate verbal notice, the magistrate entering upon his docket, "defendant," or "plaintiff," as the case may be, "to be heard in costs." The magistrate then fixes upon a time for the hearing, and gives the parties notice.

The plaintiff's costs consist, if he prevail, of charges for—1. The writ; 2. service; 3. entry; 4. travel of plaintiff; 5. attendance of plaintiff; 6. trial of issue; 7. fees of witnesses, for subpoenas and service of the same; 8. depositions; 9. copies; 10. travel of justice; 11. recognizance to prosecute an appeal.

The defendant's costs consist of the same charges, with the exception of those for writ, service, entry and issue.

1. *Writ.* For the writ, together with the declaration, parties and magistrates are forbidden, under penalties, to charge more than fifty-

¹R. S. ch. 118, secs. 14, 15.

²Ib. sec. 8.

seven cents¹. In addition to the writ, it has been a generally prevailing practice to charge for a *power*, the practice originating, it is said, in the custom of filing a power of attorney in each case. Such a charge is now, however, forbidden by statute.²

2. *Service*. For the service of an original summons or scire facias, either by reading the same or by copy, or for the service of a *capias* or attachment with summons, on one defendant, twenty-five cents; if served on more than one defendant, then twenty-five cents more for each defendant upon whom the process is served. If the officer, by the written direction of the plaintiff, his agent or attorney, shall make a special service of any writ of attachment by attaching property, he shall receive therefor fifty cents, including the summons thereon; or, if by taking the body on a *capias*, he shall be allowed fifty cents for each defendant on whom such writ shall be so served. When the officer is by law directed to leave a copy, in order to complete the service, or shall give a copy of any precept upon demand thereof, he may charge at the rate of twelve cents a page; which, in the latter case, shall be paid by the party demanding the copy. For a bail bond and writing the same, including principal and sureties, to be paid by the person admitted to bail, and taxed for him if he should prevail, twenty cents. For travel for the service of any writ, or other process, when not otherwise expressly provided by law, four cents a mile, the travel to be computed from the place of service to the court, or place of return, by the usual way; but if the distance between those places be more than fifty miles, only one cent a mile is allowed for all travel exceeding that distance. Only one travel is allowed for any one precept; but if the same be served on more than one person, the travel may be computed from the place of service most remote from the place of return, with all further necessary travel in serving such precept. For travel across any toll bridge or ferry, actually passed in serving any precept, the sum by law payable at such bridge or ferry, for a man and horse; for travel by water to or from any island, or crossing any river where no ferry is established, a reasonable charge may be allowed.³ Extra expenses are frequently allowed officers for service of precepts; and it is understood that courts have discretionary authority

¹R. S. ch. 151, sec. 23.

²Ib. sec. 13.

³Ib. secs. 4, 5, 7.

to do so.¹ No charge for service, travel or expenses paid, can by law be allowed, unless the items thereof be expressly stated, and the amount of each.²

3. *Entry.* Thirty cents is allowed the justice for this service, including filing of papers, swearing witnesses, examining, allowing and taxing the bill of costs, and entering up judgment, and recording the same.³

4. *Travel of plaintiff.* Thirty three cents for every ten miles travel is allowed the plaintiff. Costs for travel shall be taxed in all cases, according to the distance of the plaintiff, or his attorney, whichever may be nearest to the place of trial; and when the action is in the name of an indorsee, such costs for travel shall be taxed according to the distance of the attorney, payee, or indorsee, whichever shall be nearest to the place of trial; and no costs for travel shall be allowed for more than ten miles distance from any justice, municipal or police court, unless the plaintiff recovering costs, shall actually travel a greater distance, or the adverse party, if he recover costs, shall, by himself, or his agent, or attorney, travel in fact a greater distance, for the special purpose of attending court in such cause.⁴ When an aggregate corporation is entitled to costs, the travel shall be computed from the place where it is situated, if it is local in its nature; otherwise from the place where its business is usually transacted, not exceeding forty miles travel, unless the agent of the corporation shall travel a greater distance to attend court.⁵ And when the action is continued at the plaintiff's request, the defendant not appearing, but one travel shall be taxed, unless the defendant shall in writing agree to a continuance.⁶

5. *Attendance of plaintiff.* No plaintiff shall be allowed more than three day's attendance, when the defendant is defaulted, unless the defendant shall have appeared and made answer to the plaintiff's suit;⁷ nor shall more than one day's attendance be taxed for the plaintiff, in any action which shall be continued at his request, where the defendant does not appear, unless the defendant shall in writing agree to a continuance of the action.⁸

6. *Trial of issue.* Eighty cents is the sum allowed for this service.⁹

¹2 Green. 221.

²R. S. ch. 151, sec. 4.

³Ib. sec. 1.

⁴Ib. sec. 13.

⁵R.S. ch. 115, sec. 97.

⁶Act of 1842, ch. 35.

⁷R. S. ch. 151, sec. 13.

⁸Act of 1842, ch. 35.

⁹R. S. ch. 151, sec. 1.

7. *Fees of witnesses, &c.* Witnesses before justices are allowed fifty cents a day for attendance, and four cents for each mile travelled, going to and returning from the place of trial.¹ For every subpoena for one or more witnesses, ten cents is allowed.² For service of the same twenty-five cents, and if by copy, twelve cents for each page; the officer may also charge four cents a mile for actual and necessary travel, the usual way to the place of service, with all sums actually paid by him for boat hire, and crossing any toll bridge or ferry, in making service.³ Costs are not to be taxed for a witness who has not certified his travel and attendance; but it is not necessary that he shall have been examined, nor that he be subpoenaed, though the magistrate may disallow charges for witnesses, when he is satisfied they are unnecessarily summoned or unfairly taxed.⁴

8. *Depositions.* The costs of taking depositions are paid by the party requesting their taking, and are taxed by him in his bill of costs. The justice taking the deposition is allowed fifty cents for travel, as on any official duty, at the rate of fifty cents for every ten miles travel, going to and returning from the place where the deposition is taken, twenty cents for taking the deposition, for writing the same, with the caption, and for the notifications to the parties and witnesses, at the rate of twelve cents a page. The fees of the officer for service of notices are the same as for serving subpoenas, and those of witnesses the same as those in other cases before justices. The justice taking the deposition must certify his own fees, those of the deponents, and of the officer serving the notifications.⁵ If a party takes a deposition for precaution merely, and makes no use of it in the cause, the deponent being present at the trial, he does not tax it in the bill of costs.⁶ The expenses of executing a commission to take a foreign deposition will be allowed, in whole or in part, in the discretion of the court.⁷

9. *Copies.* The fees for copies filed in the case should be certified by the officer making them, and may be taxed in the bill of costs. Twelve cents for a page of two hundred and twenty-four words is the proper sum to be allowed, with twenty-five cents for affixing an official seal, when necessary to be affixed.⁸

¹R. S. ch. 151, sec. 12.

²Ib. sec. 1.

³Ib. sec. 4.

⁴15 Pick. 79—11 Ib. 241.

⁵R. S. ch. 151, sec. 1.

⁶11 Pick. 536.

⁷6 Pick. 375.

⁸R. S. ch. 151, sec. 23, 25.

10. *Travel of justice.* For travel by a justice on any official duty, he is allowed at the rate of fifty cents for every ten miles, in going and returning.¹

11. *Recognizance to prosecute an appeal.* For taking a recognizance, twenty cents is allowed.²

The magistrate should certify on the bill of costs that it has been examined and allowed by him. In case of appeal this is important, as the appellate court is to be governed by his certificate. And the party appealing, as well as the party in whose favor judgment is given, should cause his costs to be taxed and certified ; though, if this is not done, it is not within the province of the magistrate to suggest it.

¹R. S. ch. 151, sec. 1.

²Ib.

CHAPTER XII.

OF PROCEEDINGS IN SPECIAL CASES.

I. TRUSTEE PROCESS.

When it may be used. THIS is a writ of summons and attachment, given by statute for the purpose of reaching goods, effects and credits of the principal defendant, in the hands of the trustee, which could not be reached by the ordinary process. All personal actions which could by law be commenced before a justice of the peace, except actions of detinue, replevin, actions on the case for malicious prosecution, slander by writing or speaking, and actions for assault and battery, may be commenced by this process.¹

The judgment in it is twofold; first, charging or discharging the trustee; and secondly, for the plaintiff or defendant. The effect of it is, if the plaintiff prevails, and the trustee is charged, that the goods, effects and credits of the principal defendant, in the hands of the trustee, are sold to satisfy the plaintiff's execution.

Against what principal defendant. The writ may run against either individuals or corporations, as principal defendants, and may run into any county for the purpose of being served on the defendant.²

Against what trustee. All corporations, except counties, towns, school districts, and parishes, may be summoned as trustees, and the writ served upon them as other writs on such corporations; and they may answer by attorney or agent, and make disclosures, which shall be signed and sworn to by such agent or attorney.³

Individuals, never inhabitants of the State, providing the process is served upon them in a mode prescribed by law, are liable to be adjudged trustees; and the writ may be made returnable in the county, in which either the plaintiff or the principal defendant lives.⁴

Foreign corporations, though doing business in the State, and having agents here, are probably not liable to trustees process, though there

¹R. S. ch. 119, sec. 1.

²R. S. ch. 116, sec. 17.

³R. S. ch. 119, sec. 8.

⁴Ib. sec. 12.

is some reason for supposing them to be so liable, especially (under a recent law of the State) insurance companies.¹

Executors and administrators are subject to the trustee process.²

The plaintiff, as before stated, may, before or after service on the principal, insert the names of any trustees, but if names are inserted after, a new service must be made on the principal at the expense of the plaintiff.³

Of charging the trustee. Service on the trustee binds all goods, effects, or credits of the principal defendant entrusted and deposited in his hands or possession, to respond the final judgment in the action, in like manner as goods or estate when attached by the ordinary process.⁴

If any supposed trustee shall come into court on the return day of the writ, and submit himself to examination on oath, after having in writing declared that, at the time of the service of the trustee process upon him, he had not any goods effects or credits of the principal in his hands or possession, he shall be entitled to his costs in the same manner as in civil actions, where issue is joined for trial.⁵

If the plaintiff desires to examine the supposed trustee, he proposes interrogatories in writing, which are answered in writing by the supposed trustee. The disclosure, when completed and subscribed by the trustee, must be sworn to in open court, or before some justice of the peace.⁶

If a person, summoned as trustee, does not come into court, and declare that he had no property or credits of the principal in his hands, when the writ was served upon him, and submit himself to examination on oath, the court shall not award costs in his favor, though the suit be discontinued. Where, however, the plaintiff does not support his action against the principal, costs are to be awarded to all trustees, who have appeared and submitted to examination on oath.⁷

If a person, summoned as trustee, shall admit that he has in his hands goods, effects or credits of the principal, or shall wish to refer that question to the court upon the facts, he may make a statement of such facts as he deems material, and submit himself thereupon to a further examination on oath ; and such statement and further examination, if any, shall be sworn to, as above stated.⁸

¹Met. 564—Act of 1846, ch. 136.

²R. S. ch. 119, sec. 49, 43.

³Ib. sec. 6.

⁴Ib. sec. 4.

⁵Ib. sec. 16.

⁶Ib. sec. 90.

⁷Ib. secs. 25, 26.

⁸Ib. sec. 32.

If the supposed trustee, having been duly summoned, neglect to appear and answer to the suit, he shall be defaulted, and be thereupon adjudged trustee.

The answers and statements, sworn to by any person summoned as a trustee, shall be considered as true, in deciding how far he is chargeable, until the contrary is proved ; but either party may allege, and prove other facts, not stated nor denied by the supposed trustee, which may be material in deciding that question.¹

And the trustee may make the affidavit of a third person, though that person be interested, a part of his answer, provided he swear that he believes it.²

Doubts often arise, as to whether proposed questions are proper, and require an answer.

It is a matter entirely within the discretion of the magistrate to determine whether the proposed question is pertinent, and relates to new subjects of inquiry, not already answered.

The rule is positive that the trustee shall not be required to submit himself to a cross examination ; and when he has once answered a question, he shall not be obliged to repeat his answer. The plaintiff is bound to take his answers under oath as truth, and can neither impeach his character nor contradict his testimony. What the trustee may have told other persons, or said on former occasions, is immaterial, and not a proper subject of inquiry.³

Neither is the trustee bound to disclose statements of other persons ; but he may do so if satisfied of their truth.⁴

Neither is he bound, against his choice, to set up the statute of frauds, to avoid his contract with the principal defendant.⁵

A trustee is not bound to disclose matter having a tendency to charge himself criminally ;⁶ and it has been said that he is not bound to disparage his own title to real estate.⁷ The better rule, however, seems to be that no interposition should be made by the court, unless the interrogatory is plainly immaterial, or has a tendency to charge him criminally.⁸

A disclosure by a trustee that the writ in the action was not served on him, or that the service was defective, cannot be received to contra-

¹R. S. ch. 119, sec. 33—Act of 1842,
ch. 31, sec. 15.

²12 Pick. 383.

³21 Pick. 25—3 Met. 299.

⁴12 Pick. 383.

⁵18 Pick. 372.

⁶5 Pick. 447.

⁷13 Mass. 104.

⁸21 Pick. 186.

dict the return of the officer ; and if the trustee suffer thereby, he must look to the officer for his remedy.¹

A trustee may file additional answers after the examination has closed, the plaintiff thereby acquiring the right to put further interrogatories.²

Where a person shall be adjudged trustee for specific articles in his hands, he shall have a lien upon the same for his costs ; and the officer who shall dispose of the same on execution, shall pay the trustee the amount due him for costs, and deduct such amount from the proceeds of the sale, and account to the creditor for the balance. The amount of the trustee's costs should be indorsed on the execution, in such case by the justice, as evidence of the lien.³

Whenever, by the terms of the contract between the trustees and the principal, any mode of ascertaining the value of the property to be delivered to the officer, shall have been pointed out, it is the duty of the officer, on the application of the trustee, to notify the principal debtor, previously to the delivery, that the value may be thus ascertained, as far as it may affect the performance of the contract. In other cases, the value of the property, as between the principal and trustee, is to be estimated and ascertained by the appraisal of three disinterested men, one to be chosen by the trustee, one by the officer, and one by the principal, if he see fit ; if he neglect or refuse, the officer is to appoint two of such appraisers ; and they shall be duly sworn to appraise the same ; and the officer, justice, and appraisers shall certify their respective doings on the execution.⁴

When a part of such goods and articles shall be taken on execution, the trustee may deliver the residue to the principal, or tender the same to him, within thirty days after satisfaction of the execution, as he might have delivered the whole.⁵

A creditor may have the benefit of the trustee process, though he has committed his debtor on the execution, provided that he, within seven days after the service of the process, discharge the body of the debtor from prison, by a written direction to the jailor, stating the occasion and reason of the discharge.⁶

¹10 N. H. 104.

²3 Met. 299.

³R. S. ch. 119, secs. 18, 51.

⁴Ib. sec. 53.

⁵Ib. sec. 54.

⁶Ib. sec. 56.

When any person, summoned as trustee, shall in his disclosure state that he had, in his possession, at the time of service on him, property not exempt by law from attachment, but that the same was mortgaged, pledged, or delivered to him by the principal, to secure the payment of a sum of money due to him, and that the principal has a right to redeem the same, the justice shall order and decree that, on payment or tender of such money by the plaintiff to the trustee within such time as the justice shall order, and while the right to redeem subsists, the trustee shall deliver over the property to the officer, to be held and disposed of in like manner as if it had been attached on mesne process ; and in default thereof, that he shall be charged as trustee of the principal defendant.¹

If, by the disclosure, it appear that the property in the hands of the supposed trustee was mortgaged, pledged, or subject to a lien to indemnify him against any liability, or to secure the performance of any contract or condition, and that the principal has a right to redeem the same, the justice may order and decree, that upon the discharge of such liability, or the performance of such contract or condition by the plaintiff, within such time as the justice shall order, and while the right of redemption subsists, the trustee shall deliver over the property to the officer, to be held by him as before mentioned.²

It is the duty of the officer, selling on execution any personal property delivered to him as aforesaid, after deducting the fees and charges of sale, to pay the plaintiff the sum by him paid or tendered to the trustee, or applied in the performance of the contract or condition, or to the discharge of the liability, and the interest from the time of such payment, tender or application, to the time of sale ; and so much of the residue as may be required therefor, he shall apply in satisfaction of the plaintiff's judgment, after paying the trustee his legal costs. If a balance remain, it is to be paid to the debtor.³

The trustee is not prevented from selling the goods in his hands, for the payment of the sum for which they are mortgaged, pledged, or otherwise liable, at any time before the amount due to him is paid or tendered as before mentioned ; provided such sale is authorized by the terms of the contract between him and the principal defendant.⁴

¹R. S. ch. 119, sec. 58.

²Ib. sec. 60.

³Ib. sec. 61.

⁴Ib. sec. 62.

When any person, who has been adjudged trustee in the original action, shall not, on demand of the officer holding the execution, pay over and deliver to him the goods, effects and credits in his hands, and the execution is returned unsatisfied, the plaintiff may sue out a writ of scire facias against the trustee, from the justice who rendered the judgment, to show cause why judgment and execution should not be awarded against him for the sum remaining due on the judgment against the principal defendant.¹

No person shall be adjudged a trustee, in either of the cases following, to wit ;

First, by reason of having drawn, accepted, made, or indorsed any negotiable bill, draft, note, or other security, except in the cases where he may have in his possession goods, effects or credits of the principal defendant, which he holds under a conveyance, fraudulent and void as to creditors of the defendant ;

Secondly, by reason of any money or other thing, received or collected by him, as a sheriff or other officer, by force of an execution or other legal process, in favor of the principal defendant in the foreign attachment, although the same should have been previously demanded of him by the principal defendant ;

Thirdly, by reason of any money in his hands as a public officer, and for which he is accountable, merely as such officer, to the principal defendant ;

Fourthly, by reason of any money or other thing due from him to the principal defendant, unless it is, at the time of the service of the writ on him, due absolutely and without depending on any contingency ;

Fifthly, by reason of any debt due from him on a judgment, so long as he is liable to an execution on the judgment ;

Sixthly, by reason of any amount due from him to the principal defendant, as wages for his personal labor, for a time not exceeding one month ;

Seventhly, where service was made upon him by leaving a copy, and before actual notice of such service, or reasonable ground of belief that the same has been made, he shall have paid the debt due to the principal defendant, or given his negotiable security therefor ;²

Eighthly, when before a municipal or police court, or a justice of the peace, the debt received against the principal shall be a less sum than

¹R. S. ch. 119, sec. 74.

²Ib. sec. 63.

five dollars, unless the sum claimed be reduced to that sum by a set-off filed in the case.¹

Whenever an action is brought for the recovery of a debt, and the defendant has been, or shall be, summoned as a trustee of the plaintiff, the action shall be continued to await the disclosure of the trustee, unless the court shall otherwise order; and if the defendant shall be adjudged trustee, the disclosure and the proceedings thereon may be given in evidence on the trial of the action between the trustee and his creditor. If the amount disclosed shall be equal to the sum recovered in the action, the trustee shall be liable to no costs subsequent to the service of the trustee process upon him. The intervention of the trustee process does not prevent the plaintiff from recovering his costs against the principal debtor, excepting as above stated.²

If, during the pendency of an action, the defendant is summoned as the trustee of the plaintiff, the first suit may nevertheless proceed so far as to ascertain what sum, if any, is due from the defendant. The court may then continue the action for judgment, until the termination of the trustee suit, or until the attachment therein shall be dissolved by the discharge of the trustee, or by satisfaction of the judgment otherwise. If the first suit be not continued, and judgment be rendered therein, the defendant shall not afterwards be adjudged a trustee on account of the demand recovered against him, so long as he is liable to an execution on the judgment. If before final judgment is rendered in the first suit, the defendant in that suit shall be adjudged trustee in the other, and shall pay thereon the money demanded in the first suit, or any part of it, the fact shall be stated on the record of the first suit, and judgment therein shall be rendered for the costs due to the plaintiff, and for such part of the debt or damages, if any, as shall remain due and unpaid.³

Any money or other thing, due to the principal defendant, may be attached before it has become payable, provided it be due absolutely and without any contingency, as before mentioned; but the trustee shall not be compelled to pay or deliver it, before the time appointed therefor by the contract.⁴

If any person, who is summoned as a trustee, shall have in his possession any goods, effects or credits of the principal defendant, which

¹R. S. ch. 119, sec. 94.

²Ib. secs. 13, 14, 15.

³Ib. secs. 64, 65, 66.

⁴Ib. sec. 67.

he holds under a conveyance that is fraudulent and void as to the creditors of the defendant, he may be adjudged a trustee, on account of such goods, effects and credits, although the principal defendant could not have maintained an action therefor against him.¹

Every trustee shall be allowed to retain or deduct out of the goods, effects and credits in his hands, all his demands against the principal, of which he could have traced himself, if he had not been summoned as trustee, whether by way of set-off on a trial, or by the set-off of judgments or executions, between himself and the principal; and he shall be liable for the balance only, after the mutual demands between him and the principal are adjusted.²

In the demands, mentioned in the preceding section, to be adjusted between the trustee and the principal defendant, there should not be included, on either side, any claim for unliquidated damages for wrongs or injuries.³

Any debt or legacy due from an executor or administrator, and any other goods, effects or credits, in the hands of an executor or administrator as such, may be attached in his hands by the process of foreign attachment.⁴

What are goods, effects and credits. When the answer of the trustee is completed, it becomes the province of the magistrate to determine whether he had such goods, effects, or credits in his hands or possession at the time of the service upon him of the original writ, and should be charged therefor.

The rule is universal, that where the trustee once admits that he has had goods, effects or credits of the principal defendant in his hands, he is chargeable, unless he clearly discharges himself.⁵

This process manifestly contemplates two distinct classes of cases, in which a debtor may avail himself of it to secure his debt, by attaching property in the hands of a third person; the one, where the trustee has in his possession, or under his control, by goods or chattels liable by law to be attached on mesne process, by ordinary writ of attachment; the other, where the trustee is debtor to the principal defendant, and owes him money, either due and payable presently, or existing as a debt at the time of the attachment, though payable at a future day.⁶

¹R. S. ch. 119, sec. 69.

²Ib. sec. 70.

³Ib. sec. 71.

⁴Ib. sec. 48.

⁵5 N. H. 178.

⁶5 Met. 264.

1. *Goods and effects.* It is necessary that the goods and effects, the property of the principal defendant, should be in the possession of the trustee, or so within his control that they could be turned out on execution.¹

Thus a consignee is not chargeable as trustee until he has accepted the consignment, and received the goods.²

The possession must be actual, not constructive.³

They must also, as general rule, be so situated that they cannot be come at to be attached by ordinary process. Thus, if the person holding them claims a lien upon them, or holds under a fraudulent conveyance from the debtor, or under a mortgage, or as pledgee, he may be summoned as the trustee of the debtor.⁴

And when the trustee makes answer, the question of the validity of such sale, mortgage, conveyance, pledge or lien comes in issue, whether the trustee can hold the property for his own claim, and virtually make a set-off between them. The lien must be a bona fide one, created either by contract or custom, and not arising simply from a balance of account. The general rule is thus laid down by the Supreme Judicial Court of Massachusetts; "If the party who is summoned as trustee has a mere naked possession of the goods, without any special property or lien; if the principal debtor is the owner, and has a present right of possession, so that he might lawfully take them out of the custody, or authorize another to take them out of the custody, of the present holder, they would be liable to be attached as the property of the general owner, by an officer under the common process of attachment, if he could have access to them, and no right of the trustee would be violated. But if the officer cannot have access to the goods, so as to take them into custody; if they are secreted by the trustee, or if the trustee sets up pretended claims and rights of possession, so that the creditor and officer cannot safely take them out of the custody of the trustee, and require the answer and disclosure of the trustee, as to the grounds of his claim to the property and possession, then he may be summoned as trustee; and if it shall subsequently appear, on his disclosures, that he had only such naked possession, without any lien or right of possession, then the goods stand *charged* in his hands, till

¹ 5 Pick. 31—15 Maine, 86.

² 16 Mass. 343.

³ 4 Mass. 235—5 Pick. 31—16 Mass. 344.

⁴ Cush. Tr. Pr. part 1, ch. 2—R. S. ch. 119, sec. 69.

judgment and execution ; and he has no greater right to charge these goods with a debt of his own, by way of set-off, than he would have had, if the good had been taken into custody by the officer at the time of service."¹

And in case of an assignment of property in trust for the payment of debts, under the statutes regulating that subject, the assignee may, after the expiration of six months from the publication of notice of the assignment, be made trustee, where there is a surplus in his hands.² So a lessee of personal property may be made trustee.³

2. *Credits.* The statute here affects another species of property from that last considered, and accomplishes its purpose in an entirely different mode. The only question is, whether the trustee *owed* the principal debtor any thing at the time of the service of the original writ upon him, and if it appears that he did, he is held liable to pay it to his creditor's creditor, instead of paying it to the debtor himself.⁴

To determine this question, the magistrate will take into consideration the nature of the debt, whether absolute or conditional ; whether in the form of a judgment, negotiable note, account, or otherwise ; what claims, liens, or rights of set-off the trustee may have upon or against it, whether it is barred by the statute of limitations, or affected by the statute of frauds ; by whom and to whom it is payable, whether by the trustee alone or with some other jointly, and whether to the principal defendant alone, or with some other jointly ; whether the claim has been assigned by the principal defendant, if an assignment is disclosed ; and whether legal process has been commenced to recover the same of the trustee, if such process is disclosed. For the same grounds of defence are open to the trustee in this process which would have been open to him in a suit by the principal defendant ; and if he is charged, the judgment in this suit is to protect him against a future suit by the principal defendant for the same matter *pro tanto*.

The debt must be a debt for money or other thing due absolutely, and not upon a contingency, but if it be due *in presenti*, it is attachable, though payable *in futuro*.⁵ It must neither be in the form of a promissory note or judgment. It should also be due to the defendant

¹ 5 Met. 265, 267.

² Act of 1850, ch. 113, sec. 5.

³ Cush Tr. Fr. § 57.

⁴ 5 Met. 265.

⁵ R. S. ch. 119, secs. 63, 67.

or defendants, and not to him or them jointly with others not parties to the suit.¹

The rule is otherwise, however, in regard to the trustees themselves. A disclosure of an indebtedness to one of several defendants charges the trustee.* In the case of a partnership, one or more partners residing without the State, it is sufficient to serve the process on one of the partners, in order to hold the funds of the principal debtor in the partnership's hands.² But the demand must not be one due from the trustee as a public officer, sheriff, or guardian to ward. The trustee has a right to avail himself of all legal liens and rights of set-off, and also of all legal defences which he might have against the principal defendant.³ If legal process be commenced against him by the principal defendant for the recovery of the same demand, and judgment recovered before the question of charging or discharging him is settled, he is entitled to be discharged.⁴ And an assignment of the demand by the principal defendant, made in good faith, before an attachment by trustee process, though without notice to the debtor, would give the assignee a title preferable to that of the attaching creditor; and such assignment, being seasonably made known to the trustee, and being disclosed by him in his answer, would also entitle him to a discharge.⁵

And when the debt of the trustee is one drawing interest, he is not chargeable with interest after summons, unless it appears affirmatively that he was not then ready to pay.⁷

** Of facts neither stated nor denied.* Either party may allege and prove any other facts, not stated nor denied by the supposed trustee,⁶ that may be material in deciding the question.⁸

The magistrate should always remember that a party can be allowed to go into the proof only of matters that are neither stated nor denied by the trustee. That no evidence *aliunde* can be received to contradict, aid, or explain the trustee's answer, is the law both by statute and a long current of decisions.⁹ But when the trustee is ignorant of any fact, *and so states in his answer*, a party may then go into the proof. But it is presumed that it should first appear affirmatively in the answer, that the trustee neither states nor denies the alleged fact.

¹6 Mass. 271.

²13 Maine, 420.

³16 Mass. 299.

⁴5 Met. 266.

⁵R. S. ch. 119, sec. 65.

⁶4 Met. 598.

⁷18 Maine, 332.

⁸R. S. ch. 119, sec. 33.

⁹12 Pick. 386.

Of an assignment disclosed. When it appears, by the answers of any person summoned as a trustee, that any effects, goods or credits in his hands are claimed by a third person, in virtue of an assignment from the principal debtor, or in some other way, the justice may permit such claimant, if he see cause, to appear and become a party to the suit, and maintain his right.¹

The assignment, in such case, may be in writing or by parole.²

Should such claimant not appear voluntarily, notice may be issued and served upon him, in such manner as the justice may direct.³

If any such claimant shall appear, as before provided, he may be admitted as a party to the suit, so far as it affects his title to the goods, effects or credits in question, and may allege or prove any facts, not stated nor denied by the supposed trustee, and such allegations shall be tried and determined, in the manner before provided.⁴

Upon any trial, between the attaching creditor and any other person claiming the same effects, in the manner before mentioned, the principal defendant may be examined as a witness for either party, if there is no other objection to his competency, except his being a party to the original suit.⁵

If such assignee, having been duly notified, shall not appear in person or by attorney, the assignment shall have no effect to defeat the plaintiff's attachment.⁶

It is too late to summon in the assignee after the case has been argued and presented to the court.⁷

All testimony relating to the additional allegations of any party in such trial, shall be given by depositions taken and filed in the usual manner.⁸

Proceedings in case of death or marriage of trustee. If any person who is summoned as trustee in his own right, die before judgment, if any, recovered by the plaintiff, shall be fully satisfied, the goods, effects and credits, in his hands at the time of the attachment, are held thereby, and his executors or administrators shall be liable therefor, in like manner, as if the writ had been originally served on them.⁹

¹R. S. ch. 119, sec. 35.

²8 Pick. 280.

³R. S. ch. 119, sec. 36.

⁴Ib. sec. 37.

⁵Ib. sec. 39.

⁶Ib. sec. 38.

⁷17 Maine, 401.

⁸Ib. sec. 40.

⁹Ib. sec. 44.

If the person shall die before judgment in the original suit, his executor or administrator may appear voluntarily, or may be cited to appear, in the same manner as is provided in case of death of a defendant in a common action; and the further proceedings shall then be conducted in the same manner as if the executor or administrator had been originally summoned as trustee, except that the examination of the deceased, if any had been taken and filed, shall have the same effect as if he were living.¹

If, in such case, the executor or administrator shall not appear, the plaintiff, instead of suggesting the death of the testator or intestate, may take judgment against him by default or otherwise, as if he were living; in which case, if the executor shall not voluntarily pay the amount in his hands, the plaintiff may proceed by writ of scire facias against him.²

If any person, against whom execution shall issue as trustee, shall not be living at the expiration of the thirty-days after final judgment, within which it is required by law that demand be made on the trustee, demand may be made upon the executor or administrator.³

In the cases we have been speaking of, execution is not to be served on the goods or estate of the executor or administrator, nor on his person, but he is liable to the plaintiff in like manner, and to the same extent, as he would have been to the principal defendant, if there had been no trustee process.⁴

Where a feme sole, summoned as a trustee, marries before judgment, it is not necessary to cite in the husband, but he is bound by the judgment which may be rendered.⁵

In what county trustees may be required to appear. We have already seen, that the action must be brought in the county where one of the supposed trustees lives. If the trustee be a corporation, the residence of the corporation is in the county in which it has its established or usual place of business, or in which it shall have held its last annual meeting, or shall usually hold its meetings.⁶

The statute of 1842, permitting actions to be brought in any county where one of a number of defendants live, is understood to permit actions to be brought in any county in which any trustee lives.⁷

¹R. S. ch. 119, sec. 45.

²Ib. secs. 46, 47.

³Ib. sec. 48.

⁴Ib. sec. 49.

⁵5 Green. 443.

⁶R. S. ch. 119, secs. 5, 88.

⁷Act of 1842, ch. 10—12 Maine, 17.

When a trustee, at the time the writ is served upon him, dwells in any county, other than that where the writ is returnable, the justice is required, in case of his discharge, to allow him, in addition to his legal fees, a reasonable compensation for his time and expenses in appearing and defending himself.¹

A person summoned as trustee, resident out of the county where the suit is pending, is not liable for any costs.² Nor is such person required to appear in person in the original suit, or in a suit on *scire facias*; but he may appear by attorney, and declare whether he had any goods, &c. of the principal in his hands; and thereupon offer to submit himself to examination on oath. If the plaintiff proceed no further, such declaration shall be considered as true. If the plaintiff think proper to examine him upon oath, the answers may be taken before a justice of his own county.³

It may be well to add, in this connection, that in the case last mentioned, the justice ought to proceed with the action, although the trustee is discharged, and although neither plaintiff nor defendant reside in his county, unless it appear by plea in abatement, that the trustee was collusively included in the writ for the purpose of giving the court jurisdiction.⁴

If, after a judgment has been rendered in a trustee process, the defendant removes out of the county, the justice may issue execution against the trustee, directed to the proper officer of any other county, where he may be supposed to reside.⁵

For proceedings on *scire facias* against trustee, see *SCIRE FACIAS*.

II. SCIRE FACIAS.

A *scire facias* is a judicial writ, founded on some matter of record, as a recognizance, judgment, &c. requiring the person against whom it is brought to show cause why the party bringing it should not have the benefit of such record.⁶

It can issue only from the court having the record on which it is founded.⁷

Every justice of the peace may issue *scire facias* against executors or administrators, upon a suggestion of waste, after judgment against

¹R. S. ch. 119, sec. 21.

²Ib. sec. 24.

³Ib. sec. 27, 28, 29.

⁴Ib. sec. 96.

⁵Ib. sec. 95.

⁶Howe's Pr. 67.

⁷23 Pick. 110.

them ; and also against bail, taken in any civil action, and indorsers of writs ; and enter judgment and issue execution, as any court might do in like cases.¹

In all cases of *scire facias* against bail, or the indorser of a writ, or executors or administrators, and in all trustee processes, when the defendant resides out of the county where the proceedings are had, the writ or execution may be directed to any proper officer of the county where the defendant resides.²

Every such writ of *scire facias* shall be served, not less than seven days, nor more than sixty, before the time when it is returnable.³

We shall speak of this process as it lies : 1. On judgments. 2. On recognizances. 3. Against trustees. 4. Against bail. 5. On the death of parties. 6. On the marriage of a feme sole plaintiff or defendant. 7. Against executors or administrators on suggestion of waste.

1. *On judgments.* If a creditor neglect to sue out execution within the time prescribed by law, he may sue out a writ of *scire facias* against the debtor to shew cause why execution of the judgment should not be done ; and if, after due notice, no sufficient cause be shown, the court shall award execution for the amount due on the judgment.⁴

There are other cases, perhaps, in which a justice of the peace may issue *scire facias* on a judgment, but as *debt* or *scire facias* may be sued out in them, at the election of the creditor, and as the former is, in practice, much more convenient, the latter remedy may be considered, with us, out of use.⁵

2. *On recognizances.* The statutes of Maine make no provision for *scire facias* on recognizances ; and as the remedy by action of debt is obviously preferable, the magistrate will hardly have occasion to apply that under consideration.

3. *Against trustees.* We have had occasion to allude to this process as applicable to trustees, but it is necessary, in this connection to describe it with some detail.

When any person who has been adjudged a trustee in the original action, shall not, on demand of the officer holding the execution, pay over and deliver to him the goods effects and credits in his hands, and such execution shall be returned unsatisfied, the plaintiff may sue out

¹R. S. ch. 116, sec. 16.

²Ib. sec. 17.

³Ib. sec. 18.

⁴R. S. ch. 115, sec. 106.

⁵Colby's Pr. 97.

a writ of scire facias against such trustee, before the justice that rendered the judgment, to show cause why judgment and execution should not be awarded against him, and his own goods and estate, for the sum remaining due on the judgment against the principal defendant¹.

If the trustee has not been examined in the original suit, judgment, in case of default, shall be rendered against him for the whole sum remaining due on the judgment against the principal.²

When there is more than one defendant in such writ of scire facias, and they are all defaulted, not having been examined in the original suit, joint or several judgments may be entered up, according to the circumstances of the case, and execution issued in common form.³

If any trustee, who has been defaulted on scire facias, shall have been examined in the original suit, judgment shall be rendered on the facts stated in his disclosure, or proved at the trial, for such part, if any shall remain in his hands, of the goods, effects or credits, for which he was chargeable as trustee, or so much thereof as shall be then due and unsatisfied on the judgment against the principal defendant; but if it shall appear that such person paid and delivered the whole amount thereof on the execution, issued on the original judgment, he shall not be liable for any costs on the scire facias.⁴

If the trustee appears and answers to the scire facias, and if he had not been examined in the original suit, he shall be liable to be examined, in the same manner, as he might have been in that suit; and if on such examination he shall appear not to be chargeable, the court shall render judgment against him for costs only, if resident in the county where the original process was returnable; but if not resident in such county, then he shall not be liable to costs, nor shall he recover any costs.⁵

If he had been examined in the original suit, the court may require or permit him to be examined anew, in the suit on the scire facias, and in such case, he shall be permitted to prove any matter proper for his defence, on the scire facias; and upon the whole matter appearing upon such examination and trial, the court shall render such judgment as law and justice shall require.⁶

¹R. S. ch. 119, sec. 74.

²Ib. sec. 75.

³Ib. sec. 76.

⁴Ib. sec. 77.

⁵Ib. sec. 78.

⁶Ib. sec. 79.

If on a writ of scire facias against a trustee, it shall appear that he is chargeable as trustee, the sum for which he is chargeable shall be expressed in the judgment.¹

If the trustee had not appeared and answered to the original suit, he is liable to costs on scire facias.²

When a mortgagee or pledgee has been summoned as trustee of the mortgagor or pledgor, and the court has ordered, that on payment to him of the money due him, he shall deliver over to the officer the property in his hands, and it shall appear, on scire facias against him, that he has refused to comply with the order of court, the court shall enter up judgment against him for the amount of the sum due and returned unsatisfied on the execution, if there appear to be in his hands such an amount of the property mortgaged, over and above the sum received by such mortgagee or pledgee; but if not, then for the amount of said property, so exceeding the said sum; which amount of excess shall, on the trial of the scire facias, be determined by the court.³

If a person, summoned as trustee, is bound to deliver to the principal defendant specific articles, and shall not deliver them to the officer holding the execution, or so much of them as may be necessary to satisfy the execution, the creditor may have his remedy on a scire facias.⁴

If the executor or administrator of a trustee, after being charged shall not voluntarily pay the amount in his hands, the plaintiff may proceed against him, by a writ of scire facias, in like manner as if the judgment in the first suit had been against the executor or administrator himself as trustee.⁵

If, after final judgment against an executor or administrator, for any certain sum due from him as trustee, he neglects to pay the same, the original plaintiff in the trustee process shall have the same remedy for recovering the amount, either upon a suggestion of waste, or by a suit upon the administration bond, as the principal defendant in the foreign attachment would have had, upon a judgment recovered by himself, for the same demand, against the executor or administrator.⁶

4. *Against bail.* A bail bond is a bond given to the officer serving the original writ, conditioned that the defendant shall appear and

¹R. S. ch. 119, sec. 72.

²Ib. sec. 89.

³Ib. sec. 59.

⁴Ib. sec. 52.

⁵Ib. sec. 47.

⁶Ib. sec. 50.

answer to the plaintiff in the suit, and that he shall abide the final judgment of the court thereon, and shall not avoid.

This bond is returned and filed with the writ, and is so far a matter of record that the creditor may take out a writ of scire facias thereon in his own name.¹

And that, although the amount of debt and costs exceed the amount to which the jurisdiction of the justice is otherwise limited.²

When bail is taken on mesne process, in an action triable before a justice, and there shall be a return on the execution issued on the judgment, that the principal is not found, the justice may issue scire facias thereon against the bail, to be served seven days before trial; and if no sufficient cause is shown to the contrary, he may render judgment for the debt and costs recovered, with interest thereon from the time the judgment was rendered against the principal.³

If the bail shall, at any time before final judgment in the original suit is rendered, or upon the return of the scire facias and before final judgment thereupon, bring the principal before such justice, and procure the proper officer to receive the principal, such justice shall make a record of such surrender, and shall order him into the custody of the officer; and he shall commit the principal to jail; then, on payment of the costs arising on the scire facias, the bail shall be fully discharged.⁴

When the principal is so surrendered, after final judgment in the original action, the bail shall deliver to the officer a copy of the entry of the surrender, which entry the justice is required to make, attested by the justice.⁵

If the principal is surrendered before final judgment in the original suit, the bail shall deliver the officer a copy of the original writ, with the return indorsed thereon, attested by the justice.⁶

No such action shall be maintained against any person as bail, unless the writ of scire facias be served on him, within one year after the rendition of final judgment against the principal.⁷

The defendants in such action may plead either jointly or severally, that they never became bail, as alleged in the writ, and shall thereup-

¹R. S. ch. 118, sec. 18.

²Ib.

³Ib.

⁴Ib. sec. 14.

⁵Ib. sec. 16.

⁶Ib. sec. 17.

⁷Ib. sec. 8.

on be entitled to every ground of which they could have availed themselves, upon a plea that the bond is not their deed, if an action of debt had been brought on the bond ; or they may show any special matter of discharge, filing a brief statement thereof, as by law provided.¹

Filing a new count, which does not appear by the record to be for the same cause of action as the counts in the writ when it was served, will discharge the bails.²

Unless judgment be rendered on the original counts only.³

If the principal die before the return of the execution, the bond is saved, for it has become impossible, by inevitable accident, for the bail to surrender him. But the death of the principal at any time after the execution shall be returned unsatisfied, and *non est inventus* indorsed thereon, will not discharge the bail.⁴

And it will not avail the bail to show that the principal died before the execution was actually returned to the magistrate, if his death were after the return day of the execution, and after return was endorsed upon it.⁵

Or that the principal, on the day when judgment was rendered against him, was too sick to be removed without endangering his life, and so remained until after the return day of the execution, when he died.⁶

An enlistment in the service of the United States is no defence in scire facias against bail.⁷

So the discharge of the principal under the bankrupt or insolvent law, before the bail are fixed, entitles them to an *exoneratur* without a surrender.⁸

So if the principal be one exempted from arrest by some involuntary change of circumstances since the arrest on meane process.⁹

Otherwise where the change is the voluntarily act of the debtor.¹⁰

The bail are bound by the return of the officer as to the facts there stated. If it be not true, their remedy is by an action against the officer for a false return.¹¹

5. *On the death of parties.* If the plaintiff or defendant die after judgment, his executor or administrator must sue out scire facias before he can have execution.¹²

¹R. S. ch. 118, sec. 9.

²14 Pick. 177.

³Ib.

⁴2 Mass. 485.

⁵4 Pick. 120.

⁶4 N. H. 29.

⁷13 Mass. 93.

⁸1 Mass. 292.

⁹13 Mass. 94, 95.

¹⁰Ib.

¹¹17 Mass. 601.

¹²Howe's Fr. 70.

Unless there be two or more plaintiffs or defendants, and one or more of them die after judgment and before execution, in which case execution may be had for or against the survivors.¹

If any executor or administrator shall die or be removed, after judgment is rendered, either for or against him, a scire facias may be sued out, either by or against the administrator or *de bonis non*, and after due service thereof, a new execution may be issued accordingly upon such judgment, in like manner as it may be done by or against an original executor or administrator, in case of the death of his testator or intestate, after a judgment rendered for or against him, except only, that the judgment against the first executor or administrator for costs, for which he was personally liable, shall be enforced only against his executor or administrator, and not against the administrator *de bonis non*.²

6. *On the marriage of a feme sole plaintiff or defendant.* The general principle is, that where a new person is to be benefited by or charged by the execution of a judgment, there ought to be a scire facias to make him a party to it. Therefore if a feme sole plaintiff marry after judgment and before execution, there must be scire facias to execute the judgment.³

If a feme sole defendant marry, however, after judgment, and before execution, no scire facias is necessary, unless the plaintiff wishes execution against the husband as well as the wife.⁴

7. *Against executors or administrators on suggestion of waste.* When an execution against an executor or administrator, for a debt due from the estate of the deceased, is returned unsatisfied, the creditor may sue out a scire facias, upon a suggestion of waste, against the executor or administrator, and if the defendant shall not appear and show sufficient cause to the contrary, after due service of the writ, execution shall issue against him for the full amount of the original judgment and interest thereon, not exceeding, however, the full amount of the waste, if it can be ascertained.⁵

III. FORCIBLE ENTRY AND DETAINER.

The process of forcible entry and detainer, originally applicable to peculiar cases, in which the element of force existed, has, by more

¹9 Mass. 18—Ib. 160.

²R. S. ch. 120, sec. 8.

³Howe's Pr. 70.

⁴5 Green. 448.

⁵R. S. ch. 120, sec. 6.

recent statutes, been extended to almost all, if not all, cases of unlawful refusal to quit any lands or tenements.

The revised statutes provide, that any justice of the peace and of the quorum, in the county in which he resides, shall have jurisdiction of all cases of forcible entry and detainer, except those arising in a town or city therein, in which a municipal or police court is, or may be established. Such municipal and police courts have also concurrent jurisdiction with justices of the peace and quorum in cases arising in the counties in which they may be established.¹

Complaint may be made to the proper magistrate or court, in writing and on oath of any unlawful and forcible entry into lands or tenements, or of any unlawful and forcible detainer, or of any unlawful detainer, of the same; whereupon a warrant under hand and seal, is issued, directed to the sheriff or his deputy, or a constable of the town or city where the person charged resides, to summon him to show cause why judgment should not be rendered against him. The summons is to be served by reading the same in his presence and hearing, or by delivering him a copy, or leaving it at his last and usual place of abode, seven days, at least, before the day set for trial.²

On return of such service, in case of non-appearance and default of the party charged, or his failing to show sufficient cause, judgment is rendered against him for possession of the premises, and the justice, or court, issues a writ of possession to remove him.³

Should the defendant plead not guilty to the complaint, and file a brief statement of title in himself, or some other person under whom he claims the premises in question, the justice is thereupon to order him to recognize to the complainant, with sufficient sureties, in such sum as the court may order, to pay all intervening damages and costs, and reasonable intervening rent for the premises. The complainant must also be required to recognize to the defendant, with sufficient sureties, in a reasonable sum, conditioned to enter the action at the next district court, and prosecute the same to final judgment, and pay all costs adjudged against him; and if either party refuses so to recognize, judgment is to be entered, as in case of nonsuit or default, against the party so neglecting or refusing.⁴

¹R. S. ch. 128, secs. 1, 6.

²Ib. sec. 2—Acts of 1849, ch. 48.

³R. S. ch. 128, sec. 3.

⁴Ib. sec. 4.

So, either party may appeal from the judgment rendered, upon issue joined, to the next district court, recognizing, as aforesaid, to pay such costs as may be adjudged against him; but if the defendant appeals, he is to recognize to pay such reasonable intervening rent for the premises, as the justice, or court below, shall adjudge, in case his judgment shall not be reversed on such appeal.¹

We have remarked that recent legislation had extended the process of forcible entry and detainer to almost all, if not all, cases of unlawful detainer of real property.

The Revised Statutes made the process applicable to tenants, whose estate in the premises is determined, and who unlawfully refuse to quit the same after thirty days' notice in writing given by the lessor for that purpose, provided they shall not have been in quiet possession of the premises three whole years, next preceding the filing of such complaint.²

The proviso in the section quoted has now been repealed;³ and further legislation has provided that the process may be maintained, although the relation of landlord and tenant does not exist between the parties.⁴

A subsequent statute still further provides, that the process of forcible entry and detainer may be used in all cases against any lessee, who holds under a written agreement, and against any other person holding under said lessor [lessee] at the expiration of the term named in the written agreement, or when said term is forfeited by any breach of condition in said written agreement of said lessee, and also against a disseizor of lands, without having given any notice to quit to said lessee or person holding under him or said disseizor: *provided* the said lessor shall so proceed within seven days from the expiration of the term, or the breach of the same as aforesaid.⁵

It is sometimes a matter of some nicety to determine, in particular cases, who is, and who is not a disseizor. The general rule, at common law, seems to be, that it shall depend upon the election of the owner, whether an interference with his title shall constitute a disseizin.⁶ For further information upon this point, we must content ourselves with reference to the work mentioned in the note, and the cases

¹R. S. ch. 128, sec. 4.

²Ib. sec. 5.

³Acts of 1847, ch. 4.

⁴Acts of 1849, ch. 98.

⁵Acts of 1850, ch. 160.

⁶1Burrow, 110.

there cited.¹ Any person who has actually ousted the complainant, or withheld from him the possession of the premises, would probably be considered, in this state, for the purposes of the process in question, a disseizor.²

It is to be observed, that the *proviso* in the statute of 1850, does not extend to process instituted against a disseizor, but only to that of lessor against lessee. Whether a lessee, after his estate is determined by demand of rent by the lessor and nonpayment, is to be considered under this statute a disseizor, or whether he is to be treated as a lessee merely, may not be clear. If he may be treated as a disseizor, in such case he is entitled to no notice, and may be proceeded against immediately upon demand of rent, and refusal to pay. If, on the other hand, he is even, after demand and refusal of payment, still in the position of lessee, he will be entitled (unless complained against within seven days) to the thirty days' notice mentioned in the Revised Statutes, chapter one hundred and twenty-eighth.

The statute leaves the case of tenants at will untouched. A tenant at will is a person who holds under a verbal lease, and is entitled to such time to quit, after notice, as is equal to the interval between the days of payment of rent;³ or in case of nonpayment of rent, to thirty days' notice. Such notice determines his estate, after which he must have thirty days' notice under the forcible entry and detainer act of 1841. At least, so is understood to have been the decision of the Supreme Court of this State in the recent case of *Smith v. Rowe*, in Cumberland county.

A tenancy at will may also be determined by its own limitation. For example, the death of the lessor, or a conveyance by the lessor, so determines it.⁴ In such case the tenant is entitled to thirty days' notice after such determination.

A tenant at sufferance is entitled to no notice to quit.⁵

IV. REPLEVIN OF BEASTS AND CHATTELS.

Any person, whose beasts are distrained or impounded, in order to recover any penalty or forfeiture, supposed to have been incurred, by their going at large, or to obtain satisfaction for any damages, alleged

¹ Hilliard on Real Property, 86.

² R. S. ch. 145, sec. 10.

³ R. S. ch. 95, secs. 19, 20.

⁴ 21 Maine, 114—3 Met. 351.

⁵ 2 Met. 29—25 Maine, 287.

to have been done by them, may maintain a writ of replevin against the impounder or finder therefor, to be sued out and prosecuted before any justice of the peace for the county, in the form prescribed by law.¹

The writ shall be sued out, served and returned, and the cause shall be heard and determined, in like manner as is provided in the case of other civil actions before a justice of the peace, except as otherwise prescribed.²

The writ shall not be served, unless the plaintiff or some one in his behalf, shall execute and deliver to the officer a bond to the defendant, with sufficient sureties, to be approved by the officer, in a penalty double the value of the property to be replevied, with condition to prosecute the replevin to final judgment, and to pay such damages and costs, as the defendant shall recover against him, and also to return the said property, in case such shall be the final judgment; such bond to be returned with the writ for the use of the defendant.³

For the judgment in this action, see the chapter on Judgments.

For the right of appeal, see the chapter on Appeals.

For the mode of transferring the action to the District Court, when the sum demanded exceeds twenty dollars, and in other cases, see chapter vii.

When any goods of a value not exceeding twenty dollars, shall be unlawfully taken, or unlawfully detained from the owner, or the person entitled to the possession thereof, or when any goods of that value, which are attached on mesne process, or taken in execution, are claimed by any person other than the defendant in the suit, in which they are so attached and taken, such owner or person may cause them to be replevied by process from a justice of the peace.⁴

For the judgment in this action, see the chapter on Judgments.

V. OF GOODS FORFEITED, AND OF LOST GOODS.

1. *Of goods forfeited.* When any personal property shall be forfeited for any offence, and no special mode is prescribed for recovering the same, any person entitled thereto, in whole or in part, may seize and keep the same until final judgment, unless they are restored on the bond as hereafter mentioned.⁵

¹R. S. ch. 180, sec. 1.

²Ib. sec. 2.

³Ib. sec. 3.

⁴Ib. secs. 8, 9.

⁵R. S. ch. 182, sec. 1.

If the person claiming the same, for himself or another, shall give bond, with sufficient surety or sureties, to the party seizing, to pay the appraised value thereof, when, and if the same shall be decreed forfeited, then the same shall be restored to such owner or claimant.¹

The value shall be ascertained by the appraisement of three disinterested men, mutually chosen by the parties ; or if they cannot agree, by a justice of the peace of the county.²

If no person claims the property after it has been so seized, the party seizing shall cause an inventory and appraisement of the same to be made by three disinterested persons, under oath, appointed by a justice of the peace of the county, which value shall be the rule for deciding, where the libel shall be filed.³

When the property seized shall not exceed the value of twenty dollars, the party seizing shall, within twenty days after seizure, file a libel before a justice of the peace of the county where the offence was committed, stating the cause of seizure, and praying a decree of forfeiture. The justice is thereupon to make out notice to all persons, to appear before him, to show cause why such decree should not be passed. Such notice must be posted up in two or more public places in the county, seven days at least before the day of trial. And such justice shall, at the time fixed by him for trial, try and decide the cause, and make such decree therein as the law requires.⁴

Either party may appeal to the next district court for the same county, recognizing as in other cases of appeal.⁵

Depositions, duly taken, may be used in these cases.⁶

2. *Of lost goods.* Any person finding any money or goods, of the value of three dollars, or more, the owner whereof is unknown, is required, within ten days, to give notice of the same, in writing, to the town clerk of the town in which they are found, and to cause a notification thereof to be posted up in some public place in the same town ; and if there be any public crier in the town, he shall also cause the same to be cried publicly therein on three several days.⁷

If the money or goods be of the value of ten dollars, or more, the same is required to be cried, and notice given by posting as above mentioned in two towns adjoining, in addition to the requirement above.⁸

¹R. S. ch. 182, sec. 2.

²Ib. sec. 3.

³Ib. sec. 4.

⁴Ib. secs. 5, 9.

⁵Ib. sec. 10.

⁶Ib. sec. 12.

⁷Ib. sec. 13.

⁸Ib. sec. 14.

Every finder of lost goods, of the value of ten dollars or more, shall also, within two months after finding, and before using the same to their disadvantage, procure from the town clerk or a justice of the peace, a warrant directed to two persons, not interested, except as inhabitants of the town, to be appointed by said clerk or justice, returnable within seven days from the date, into the town clerk's office, to appraise the goods under oath.¹

If the owner of such lost goods or money appear within one year after notice given to said clerk as aforesaid, and shall give reasonable evidence of his right thereto to the finder, he shall have restitution of the same or the value; allowing and paying all necessary charges, including a reasonable compensation to the finder for his trouble; to be liquidated and adjudged by some justice in the county, if the owner and finder do not agree.²

If no owner appear, within one year, as aforesaid, such money or goods shall remain to the finder, he paying one half the value, all necessary charges deducted, to the treasurer of the town: and in case of the neglect of the finder, then to pay the same on demand, after converting the same to his own use, the same may be recovered in an action, to be brought by said treasurer in the name of the town.³

If the finder shall neglect to give notice, and cause the goods to be advertised and cried, he forfeits the value of the goods, one half to the use of the town, and one half to the person suing for the same; and is besides responsible to the owner for the value of the goods.⁴

VI. POOR DEBTORS.

1. *Of arrest and disclosure on mesne process.* In all actions not founded on contract, or on a judgment on such contract, the original writ or process shall run against the body of the defendant, and he may thereon be arrested and imprisoned, or he may give bail.⁵

No person can be arrested on mesne process, in any suit brought on contract, or in judgment founded on contract, except as follows: Any person, whether a resident within this State or not, may be arrested and held to bail, or committed to prison on mesne process, on any contract, express or implied, when the sum demanded amounts to ten

¹R. S. ch. 132, sec. 15.

²Ib. sec. 16.

³Ib. sec. 17.

⁴Ib. sec. 18.

⁵R. S. ch. 148, sec. 9.

dollars, or on a judgment founded on contract, when the debt originally recovered and still remaining due, is ten dollars or more, exclusive of interest on such judgment, when he is about to depart and reside beyond the limits of the State, with property or means exceeding the amount required for his immediate support; provided that the creditor, his agent or attorney, shall make oath before a justice of the peace, to be certified by such justice on such process, that he has reason to believe, and does believe, that such debtor is about to depart and reside, and to take with him property or means as aforesaid; and that the demand in said process, or the principal part thereof, amounting at least to ten dollars, is due him.¹

On the arrest or imprisonment of any debtor, by virtue of the provisions last mentioned, he may, on request of the officer or jailor who has him in custody, be taken before two disinterested justices of the peace and quorum, to disclose the actual state of his affairs.²

Such justices are to be selected, one by the debtor, one by the creditor, his attorney or agent, if the same can be conveniently done, otherwise by the officer having such debtor in charge, or if he be at large, by the sheriff, or any deputy, constable or coroner, who might legally serve the precept on which he is arrested, as the case may be; and such officer may also select, in case the parties or either of them decline so to do. In case said justices, so selected, do not agree, they may select a third, and a majority shall decide; and if said justices are unable to agree on a third, he may be selected by the officer as before mentioned.³

The justices must reside in the town where the disclosure is made, or in an adjoining town.⁴

The parties will be considered as "declining" to select, when they omit to appear and make selection.⁵

If the creditor neglects, refuses, or unreasonably delays to select, the justice selected by the debtor may adjourn once, if he deems it necessary, but not exceeding twenty four hours, (Sundays excluded,) to enable the debtor to procure the attendance of another justice.⁶

It is not necessary that the court should be organized at the precise

¹R. S. ch. 148, secs. 1, 2.

²Ib. sec. 3.

³Ib. sec. 46—Acts of 1844, ch. 88.

⁴Ib.

⁵23 Maine, 489.

⁶Acts of 1846, ch. 215.

hour appointed, or even within an hour thereafter. A liberal construction is given to the statute in this particular.¹

When a third justice has been called in to act with the others, he should act until the final decision is made.²

When the creditor selects a justice, it is his duty to procure his attendance at the time and place appointed for the disclosure.³

Previous to such disclosure, the debtor must give due notice to the creditor, his agent or attorney, of his intention, and of the time and place for attending to said disclosure ; and that such creditor, agent or attorney, may be present and select one of the justices, and be heard thereon ; which notice shall not be less than one day for every twenty miles travel, exclusive of Sunday.⁴

If the debtor shall, at the time and place appointed, make to the satisfaction of the justices, a full disclosure of the actual state of his affairs, and of all his estate, property, rights and credits, in possession, expectation or reversion, and answer all proper interrogatories in regard to the same, and shall sign and offer to make oath to the truth of his disclosure and answers, before such justices, they shall administer to him such oath, and may hear such further and proper evidence, as may be offered upon either side.⁵

The justices shall have power to adjourn, from time to time, if they shall see cause ; and if either of them shall not be present at such adjournment, the other may adjourn to another time, but no such adjournment, or adjournments, shall exceed three days in the whole, exclusive of Sunday.⁶

On such examination, the justices may discharge such debtor from arrest and imprisonment, or remand him into the custody of the jailor or other officer, as the case may require ; and in case of such discharge, no execution issuing on the judgment in such suit or process, shall run against the body of such debtor.⁷

All attachable property, disclosed by such examination, or so much thereof as the creditor may designate, to satisfy his demand against the debtor, shall be held as attached from the time of such disclosure, and until thirty days after final judgment, as in other cases of attachment.⁸

¹26 Maine, 101.

²27 Maine, 551.

³Acts 1848, ch. 85, sec. 1.

⁴R. S. ch. 148, sec. 4.

⁵Ib. sec. 5.

⁶Ib. sec. 6.

⁷Ib. sec. 7.

⁸Ib. sec. 8.

Whenever any person shall be served with an original writ or other mesne process founded on contract or judgment, as before stated, in any other manner than by arrest of the body, such person may, at any time before final judgment, appear before any court or justice, before whom such writ or process may be pending, or before a disinterested commissioner or commissioners, to be appointed by such court or justice, and submit himself to examination ; and such court, justice, or commissioner shall, after giving like notice of the time and place of hearing, as has been before stated, then and there proceed to take the disclosure of such person ; and the like proceedings shall be had before such court, justice, or commissioner, as is provided, as aforesaid, when they are had before two justices of the peace and quorum, and with like effect.¹

On the whole examination, the said court, justice, or commissioner may adjudge and determine, (providing the debtor shall not refuse to assign and deliver property disclosed by him, and which cannot be come at to be attached, as is mentioned on a subsequent page of this division,) that the execution on the judgment, which the plaintiff may recover in such suit, shall run against the property only of the defendant, or otherwise, as justice may require, on the facts so disclosed and proved ; and all attachable estate or property so disclosed is, from the time of such disclosure, held attached.²

If the property so disclosed be real estate, the said court, justice or commissioner, as the case may be, shall deliver to the plaintiff a certificate thereof, stating the names of the parties and the amount of the claim in the writ, which the plaintiff shall cause to be filed with the register of deeds for the county or district where the real estate is situated, within five days after the date thereof.

If personal property liable to attachment be disclosed, on application of the plaintiff, stating that he is apprehensive that said property may be removed or concealed, so as to render it impracticable to seize the same on execution, the justice, before whom the suit is pending, may issue an order, under his seal, directing any officer authorized to serve processes in such suit, to take such property into his custody and hold the same, as if originally attached.³

¹R. S. ch. 148, sec. 10.

²Ib. sec 11.

³Ib. secs. 12, 13.

At any time before or after the return day of any such writ or process as is last mentioned, the parties to the suit may, pursuant to any agreement by them made in writing, appear before any justice of the peace and of the quorum, in the county where the suit is pending ; and the defendant shall make the same disclosures and submit to the same examination and proceedings as are above described, when had before a commissioner, and the record of the same shall, before final judgment, be returned to the court or justice before whom the suit is pending, and the like proceedings shall be had by such court or justice, as if the disclosure had taken place before a commissioner, duly appointed for the purpose.¹

If no disclosure and examination be had before final judgment, or if the result of such disclosure and examination be adverse to the defendant's right to exemption from arrest, the execution which may issue against him on, final judgment, shall run against his body.²

If on the disclosure and examination of any debtor, made pursuant to the provisions before mentioned, before final judgment, it appears that the debtor possesses or has in his power, or has, with intent to protect the same from his creditors, assigned, or secreted, or otherwise disposed of, any bank bills, notes, accounts, bonds, or other contracts, or other property not exempted by any statute from attachment, but which cannot be come at to be attached, from its nature or otherwise, such debtor, if under arrest, shall not be released, nor, in any case, shall his person be exempted from arrest on any execution to be issued on the judgment to be recovered in such suit, unless the debtor shall assign and deliver to such person, as the examining magistrates, or court, or commissioners shall appoint, all such property, or so much thereof, as such magistrates, or court, or commissioners may adjudge to be sufficient security for the creditor ; to be held by such person, under the direction of the court or justice, before whom the suit shall be pending, in trust for the parties, in order that the same may be applied as is provided when such property is disclosed on execution.³

When any person shall be arrested or imprisoned on meane process, in any civil action, he may be released by giving bond to the plaintiff, as is provided by chapter one hundred and forty-eight, section sixteen, of the Revised Statutes.

¹R. S. ch. 148, sec. 14.

²Ib. sec. 16.

³Ib. sec. 15.

The justices, who are to approve such bond, are to be selected in the same manner as those who may approve a bond taken on execution ; and in case of disagreement the same proceedings are to be had.¹

2. *Of arrest and disclosure after judgment.* No person can be arrested on any execution, issued on any judgment in any suit, founded on any contract, express or implied, where the debt is less than ten dollars, exclusive of costs, or on any suit founded upon any prior judgment or contract, where the amount of the original debt remaining due is less than ten dollars, exclusive of costs ; and the form of the process is to be varied accordingly.²

In all other cases, except where express provision is by law made to the contrary, executions shall run against the body of the judgment debtor ; and he may be arrested and imprisoned thereon, for the purpose of obtaining a discovery of his property, wherewith to satisfy the same, as subsequently stated.³

Any debtor, arrested or imprisoned on execution, issued on any judgment in a civil suit, may give bond to the creditor in execution, as provided in the twentieth section of chapter one hundred and forty-eight of the Revised Statutes.⁴

The justices who, in case the creditor does not approve in writing the sureties in such bond, may approve the same, are now required to be selected in the same manner as justices, before whom the disclosure is to be made, are selected ; and in case of disagreement, the same proceedings are to be had, as in case of disagreement between the latter.⁵

Any debtor, arrested or imprisoned on mesne process or on execution, in any civil suit, who shall have given bond to the creditor conditioned that he will, within the time mentioned in the bond, cite the creditor before two justices of the peace and of the quorum, and submit himself to examination, and any person, being in prison by force of any execution in a civil suit, may make application in writing to any justice of the peace of the county, in which he is arrested or imprisoned, claiming to have the privilege and benefit of the oath prescribed by the twenty-eighth section of chapter one hundred and

¹Act of 1848, ch. 85, sec. 6.

²R. S. ch. 148, sec. 18.

³Ib. sec. 19.

⁴Ib. sec. 20.

⁵Acts of 1848, ch. 85, sec. 6.

forty eight of the Revised Statutes ; or, if the debtor be imprisoned, the keeper of the jail shall, if requested by the debtor, make such application in his behalf.¹

The justice is thereupon to appoint a time and place for the examination of the debtor, and to give notice thereof to the creditor, by a citation under his hand and seal, which notification is to be served and returned by any officer who is qualified to serve any civil process between the parties.²

The notification must be served on the creditor by reading it to him, by leaving an attested copy at his last and usual place of abode, or by giving him in hand an attested copy, fifteen days at least before the time appointed for the examination, if the creditor be alive and within the state ; otherwise it shall be served in like manner on the person who was his attorney in the suit, the executor or administrator of a deceased creditor, or some known authorized agent ; and if no such representative can be found in the State, a copy of the notification shall be left in like time with the clerk of the court or justice of the peace, from whom the execution issued.³

If the demand has been assigned by the creditor, or by operation of law, and the debtor has notice of such assignment, it would be proper, and probably necessary, to give notice to the assignee.⁴

Where there is more than one creditor, notice to any one, being within the state, is sufficient for all.⁵

If the creditor be a corporation aggregate, the notification may be served on any individual upon whom service of any original writ or summons may be made, as mentioned at page 36 of this volume, or upon the attorney of the corporation in the suit ; but the time when such service is to be made is the same as that required to be made upon an individual creditor.⁶

The examination of the debtor is to be had before two disinterested justices of the peace and of the quorum for the county, and the justices have like power to adjourn as is provided in case of disclosur on mesne process.⁷

It is the duty of the justices to examine the notification and return, and if they deem the same correct, (their decision upon this question

¹R. S. ch. 148, sec. 21.

²Ib. sec. 22.

³Ib. sec. 23.

⁴22 Maine, 400.

⁵R. S. ch. 148, sec. 58.

⁶Ib. sec. 55.

⁷Ib. sec. 24.

being conclusive,) they are to examine the debtor on his oath, concerning his estate and effects, and the disposal thereof, and his ability to pay the debt for which he is committed ; and they shall also hear any other legal and pertinent evidence, that may be adduced by the debtor or creditor.¹

The creditor may propose to the debtor any interrogatories pertinent to the inquiry, and they shall, if required by the creditor, be proposed and answered in writing, and the answers shall be signed and sworn to by the debtor ; and the creditor may have a copy of the interrogatories and answers, certified by the justices, on paying therefor the same fees as for a deposition of the same length.²

If, upon such examination, and the hearing of such evidence, the justices shall be satisfied that the disclosure is true, and shall not discover any thing thereby inconsistent with his taking the oath set forth below, they may proceed, after due caution to him, to administer the same.³

It will be observed, that the oath required to be taken covers very broad ground, comprising not only property at the time belonging to the debtor, but any property disposed of, since the contracting of the debt, with intent to defraud any of the creditors of the debtor ; so that if the debtor has conveyed property, even for the purpose of defrauding creditors other than the creditor in the execution upon which he is disclosing, he cannot be permitted to take the oath.⁴

The oath to be administered is as follows: "I, ———, do solemnly swear," (or "affirm," as the case may be,) "that I have not any estate, real or personal, in possession, reversion or remainder, except the goods and estate expressly exempted by statute from attachment and execution, and whatever property I have now disclosed ; and that I have not since the commencement of this suit, or the time when the debt, or cause of action, or any part thereof, on which this suit was brought, was contracted by me, directly or indirectly, sold, loaned, leased, or otherwise disposed of, or conveyed or entrusted to any person or persons, whomsoever, all or any part of the estate, real or personal, whereof I have been the lawful owner or possessor, with any intent or design to secure the same, or to receive or expect any profit, advan-

¹R. S. ch. 148, sec. 25—27 Maine, 153.

²Ib. sec. 26.

³Ib. secs. 27, 31.

⁴24 Maine, 509.

tage or benefit therefrom, to myself or others, with an intent or design to defraud any of my creditors. So help me God ;" (or, "this I do under the pains and penalties of perjury," if the debtor affirms.)¹

If from the disclosure of the debtor, it appear that he possesses, or has under his control any bank bills, notes, accounts, bonds, or other contracts, or any property not exempted expressly by statute from attachment, but which cannot be come at to be attached, and if the creditor and debtor cannot agree to apply the same in part or in full discharge of the debt, the justices shall appraise and set-off such property, or enough of the same to satisfy the amount of the debt, costs and charges ; and the creditor or his attorney, if present, shall have the right to select the property to be so appraised. If the creditor will accept the same, it may thereupon be assigned and delivered by the debtor to the creditor, and applied in satisfaction of his demand, in whole or in part, as the case may be. If any particular article of property thus appraised and set-off, and necessary and convenient to be applied in satisfaction of the execution, should exceed the amount or balance due thereon, and not be divisible in its nature, the creditor shall have a right to take the same, on advancing to the debtor the overplus, or securing the same to the satisfaction of the justices.²

If the creditor be absent, or shall not then conclude to accept the same, the debtor shall deposit with the justices an assignment in writing to the creditor, of all the property thus appraised and set-off ; and the justices shall make a record of such proceedings, and cause the property so disclosed to be safely kept and secured for the term of thirty days thereafterwards, to be delivered to the creditor, with the assignment aforesaid, on his demanding the same within that time. If not so demanded, they shall be returned to the debtor.³

The justices are not authorized to make out a certificate of discharge, until such property, so disclosed, has been disposed of or secured ; nor is the creditor required to request that such disposal be made, or to accept an assignment other than according to the statute.⁴

After administering the oath to the debtor, and after the property disclosed, as just mentioned, shall have been duly secured, the justices shall make out and deliver to the debtor, a certificate under their hands and seals in the form following :⁵

¹R. S. ch. 148, sec. 28.

²27 Maine, 97.

³Ib. sec. 29—Acts of 1848, ch. 85, sec. 5. ⁴R. S. ch. 148, sec. 31.

⁵R. S. ch. 148, sec. 30.

“ STATE OF MAINE.

—, ss. To the sheriff of the county of —, or his deputy, and to the keeper of the jail at —," (or, "to any coroner," or "constable," as the case may require.)

[Place of Seal.] "We, the subscribers, two disinterested justices of the peace
[Place of Seal.] and of the quorum, in and for said county of —, hereby
certify, that —, a poor debtor, arrested on a certain execution issued by" (here insert the name and style of the court, or of the justice of the peace, and the amount of the judgment, and date of the judgment and execution,) "and committed to the jail at — aforesaid," (or "enlarged on giving bonds to the creditor," as the case maybe,) "hath caused —, the creditor, to be notified according to law, of his the said debtor's desire of taking the benefit of the one hundred and forty-eighth chapter of the Revised Statutes of this State, entitled, "of the relief of poor debtors," that in our opinion he is clearly entitled to have the oath, prescribed in the twenty-eighth section of said chapter, administered by us, and that we have, after due caution to him, administered said oath to him.

Witness our hands and seals, this — day of —, in the year
18—. — —, } *Justices of the peace*
 — —, } *and of the quorum.*

Whenever any debtor in execution shall disclose before two justices of the peace and of the quorum any real estate liable to be levied upon by virtue of such execution, the justices are required to give the creditor a certificate thereof, stating therein the names of the parties, and the amount of the execution ; and the creditor shall have a lien on such real estate for thirty days thereafter ; provided he shall file said certificate as is provided in case of disclosure of real estate on mesne process, as before stated.¹

If the debtor shall disclose any personal estate, liable to be levied upon by said execution, the creditor shall also have a lien thereon, or so much thereof, as the justices in their record shall judge to be necessary, for the term of thirty days ; and if the debtor shall transfer, conceal, or otherwise dispose of the personal property, so disclosed or

¹R. S. ch. 148, sec. 33.

designated, within the thirty days, or suffer the same to be done, or if he shall refuse to surrender the same on the demand of any proper officer, having an execution on the same judgment, the debtor shall receive no benefit from the certificate of the justices, and is also subject to other penalties.¹

If, on the examination of a judgment debtor, who has given bond on mesne process, such debtor shall not entitle himself, in the opinion of the justices, to the benefit of the poor debtor's oath, and if it appear that said debtor, at the time of such examination, has any real or personal estate liable to attachment or levy under execution, or that he has property such as has been before described as property which cannot be come at to be attached, the said debtor shall by the justices be permitted to go at large, upon the bond given at the time of his arrest, during the thirty days in which the creditor's lien shall exist on the property disclosed; and during that term the creditor may arrest the debtor on execution, or enforce his lien on the property disclosed.²

The bond taken by an officer should be returned with the execution; and the creditor is entitled to receive it, on filing a copy with the justice.³

No debtor is to be precluded from taking any oath, under the act for the relief of poor debtors, on account of his having been convicted of any crime, or being otherwise disqualified to testify as a witness in judicial proceedings; and nothing contained in said act, except in case of fraudulent disclosure, or fraudulent concealment of property disclosed, can prevent any debtor, who shall fail to obtain his discharge, from obtaining a certificate for that reason, at a future examination for the same debt.⁴

If any debtor fail in his application for a discharge from arrest or imprisonment, the creditor recovers his costs, to be taxed as in actions before a justice of the peace; and the justices shall award the same, and issue execution accordingly.⁵

3. *General provisions, applicable to certain specified cases of arrest and imprisonment.* Any person arrested or imprisoned by virtue of any warrant for the collection of any public tax shall be

¹R. S. ch. 148, sec. 34.

²Ib. sec. 36.

³Ib. sec. 38.

⁴Ib. sec. 40.

⁵Ib. sec. 41.

entitled to the privileges of the act for the relief of poor debtors, and subject to the obligations of the same in all respects, as if arrested or committed on execution for debt, and for all the purposes of notice and other proceedings relating to the discharge from arrest or imprisonment of the person taxed, the assessors of the town, plantation or parish, by whom such warrant was issued, shall be regarded as the creditors.¹

In such case, the oath is to be varied by substituting for the words "commencement of the suit," or "the time when the debt or cause of action, or any part thereof, on which this suit was brought, was contracted by me," the following, "assessment of the tax for which I have been arrested," and for the words, "any of my creditors," the following, "any town, plantation or parish." And the certificate of discharge is also to be changed by substituting the words, "a warrant for taxes," for "execution," and "assessors" for "creditors."²

Whenever any constable, collector, or deputy sheriff shall be arrested, or committed to jail, for default, on account of any taxes committed to him to collect, such constable, collector, or deputy sheriff, is subject to the provisions of the poor debtor act, and has the privileges thereof, and in all proceedings under said act, in such case, the assessors of the town, plantation or parish, assessing such taxes, are to be deemed the creditors, and corresponding verbal alterations are to be made in the oath and certificate aforesaid.³

Whenever, in pursuance of law, in the trial of any action of trespass upon property, any court, or jury, or justice, shall have determined that such trespass was committed wilfully, and the court or justice shall have made a record of the fact, and the same shall have been noted on the margin of any execution on such judgment, and the judgment debtor shall be arrested thereon, he shall be committed to prison, and shall not be entitled to give any of the bonds, provided in the poor debtor act, for the liberation of his person; and if, in such case, such person shall apply to take the oath prescribed by said act, it is forbidden to issue notice to the creditor, until at least thirty days after the commitment of the debtor.⁴

¹R. S. ch. 148, sec. 50.

²Ib. secs. 51, 52.

³Ib. sec. 53.

⁴Ib. sec. 54.

Any creditor may discharge his debtor from arrest or imprisonment on execution by giving to the officer making the arrest, or by leaving with the keeper of the prison, a written permission for the debtor to go at large, and the body of the debtor shall ever thereafter be exempted from arrest or imprisonment on the same debt; and the officer having the debtor in custody is required, at any time after such release, or at any time after his release in any of the modes provided by the poor debtor law, to indorse upon the execution a certificate of the fact and the cause thereof.¹

The execution is, in such case, to be enforced in the same manner as if it no longer run against the body, and when renewed, is to be altered accordingly. And whether such indorsement is made, or not, the judgment may be enforced as a judgment against the goods and estate only.²

The judge of any municipal or police court, within his county, has the same powers, and is made subject to the like duties and obligations, under the act for the relief of poor debtors, as any justice of the peace and quorum in the same county.³

4. *Proceedings in suit on bonds.* The Revised Statutes provide, that if the debtor fail to fulfil the condition of his bond, judgment in any suit upon it shall be rendered for the amount of the execution and costs, and fees of service, with interest on the same, against all the obligors; and that a special judgment shall also be rendered against the principal debtor for a further sum equal to the interest on the same, at the rate of twenty per cent. by the year, after the breach of the bond.⁴

A subsequent statute provides, that in all actions commenced in the superior courts, if it shall appear, that prior to a breach of any of the conditions of such bond, the principal therein had been allowed by two justices of the peace and of the quorum, to take, and had taken before such justices, the oath prescribed in the poor debtor act, the damage shall be assessed by the jury, if such be the request of either party; but if no such request be made, then by the court; and that the amount assessed shall be the real and actual damage and no more; and that any legal evidence upon that point may be introduced by either party.⁵

¹R. S. ch. 148, secs. 59, 60, 61.

²Ib. secs. 60, 61.

³Ib. sec. 62.

⁴Ib. sec. 39.

⁵Acts of 1848, ch. 85, sec. 2.

The new judgment operates, in such case, to discharge, *pro tanto*, the execution, or warrant.¹

If the verdict or judgment be, that the creditor has sustained no damage, no costs are to be allowed to either party.²

The same statute provides, that "in all such actions commenced before a justice of the peace, or municipal judge, or town judge, the amount which the plaintiff may recover shall be the real and actual damage, which has been sustained by breach of the conditions of the bond and no more."³

If the bond is broken by reason of the irregular organization of the court, it has been decided that, under the second section of the act just referred to, providing no damage has been occasioned to the creditor, the action on the bond must fail; and that the breach of the bond is no damage, if the debtor had no attachable property.⁴

5. *Disclosure of debtors to the State.* Any person committed to jail on any execution, warrant of distress, or any other final civil process, for a debt, penalty, or costs due to the State, may, by application to the jailer having him in custody, avail himself of the provisions of law for the benefit of poor debtors.⁵

Upon such application, it is the duty of the jailor to apply in writing to a justice of the peace in behalf of the debtor, and the justice is required to issue a notification, directed to the county attorney for the county for which the commitment is made. The notification is to be served and returned, and like proceedings thereupon are to be had, as in cases where notice is served on individual creditors or their attorneys.⁶

The justices are to make the oath and certificate conform to the case.⁷

6. *Disclosures under the bastardy act.* When a person, who has been adjudged to be the father of a bastard child, shall have remained ninety days in jail, without being able to comply with the order of court, he may be liberated by taking the poor debtor's oath, in the same manner as persons may who are committed on execution. The notification, in such case, must be served on the complainant, if living,

¹Acts of 1848, ch. 85, sec. 3.

²Ib.

³Ib. sec. 4.

⁴20 Maine, 457.

⁵R. S. ch. 148, sec. 70.

⁶Ib.

⁷Ib. sec. 72.

and also on the clerk of the town where the child, of which the debtor has been adjudged the father, has its legal settlement, if in this State.¹

VII. PROCEEDINGS IN CASES OF INSANE PERSONS, &c.

It is made the duty of parents to send their insane children, and guardians their insane wards, being minors, to the insane hospital, within thirty days after the attack of insanity, if they are able to pay for supporting them there ; but no parent, guardian, or friend, is debarred from committing such insane person to any other hospital for the insane, if so committed within thirty days of the attack of insanity.²

All insane persons not sent to the hospital by parents or guardians as above stated, are made subjects of legal examination.

The mayor and aldermen of cities, and the selectmen of towns are, in their several cities and towns, made a board of examiners, whose duty, upon complaint in writing of any relative of such insane person, or of a justice of the peace or quorum in the town where such insane person or persons reside, is to inquire into the condition of every insane person in their cities and towns and adjacent plantations, so soon as the existence of such case shall come to their knowledge ; and they are authorized and required to call before them such testimony as shall be necessary to a full understanding of the case ; and if it appear to them that the person is insane, and they shall be of opinion that the comfort and safety of the patient or others interested will be promoted by a residence in the insane hospital, it shall be their duty to send such person forthwith to that institution, accompanied with a certificate stating the fact of insanity, and also the city or town in which the patient resided, was commorant or found, at the time of arrest and examination, ordering the superintendent to receive and detain him in his care, until he shall become of sound mind, or be otherwise discharged by order of law, or by the superintendent or trustees. And it is the duty of the superintendent to receive all patients legally sent to the hospital, unless the number exceed the accommodation provided by the State.³

In all cases decided by the mayor and aldermen or selectmen as aforesaid, the right of appeal is allowed to any corporation or individ-

¹R. S. ch. 181, sec. 12.

²Acts of 1847, ch. 33, sec. 7.

³Ib. sec. 8.

ual who may deem themselves or the patient injured by the decision of the mayor and aldermen or selectmen, whether the same shall have been for or against the fact of insanity, or committal.

The person or persons claiming such appeal must make application therefor in writing to the mayor and aldermen, or selectmen, as the case may be, within five days from the time when the decision is made known, stating their wishes, and naming a justice of the peace and of the quorum on their part, residing in the same city or town, or one adjoining, to sit and hear the appeal, specifying the time and place for the hearing, which place shall be in the same city or town in which the insane person resides, or one adjoining, and the time within three days of that of making the request; and the appellant shall notify and procure the attendance of said justice, if in his power, and if not, another shall be substituted in his place.

The mayor and aldermen, or selectmen, shall select another justice of the peace and of the quorum to sit with that selected by the appellant, and they two have power to call before them such testimony as they may deem proper, and to hear and determine all matters brought before them touching the premises; and if they shall find the person insane, they shall say so; and if they are of opinion that he will be more comfortable or safe to himself or others, they are to give an order under their hands for his conveyance to, and detention in the insane hospital, until he shall become of sound mind, or be otherwise legally discharged.

It shall be certified in such order that the person named in it is insane, and also in what city or town such person was residing, commorant, or found at the time of arrest and examination.¹

If the mayor and aldermen of any city, or selectmen of any town, shall refuse or neglect to examine and decide on any case of insanity, existing in their respective towns or cities, complaint may be made by any relative of such insane person, or by any other respectable person, to two justices of the peace, one of which shall be of the quorum, and said justices shall, as soon as may be, sit in some place within said city or town, or one adjoining, and hear and decide on the case; and they are empowered and required to call before them such testimony as they shall deem proper, and they are to inquire into and determine,

¹ Acts of 1847, ch. 33, sec. 9—Acts 1848, ch. 79.

both as to the insanity, as well as all other matters touching the case—and if they find the person insane, they shall so decide ; and if in their opinion, the patient would be rendered more comfortable and safe to himself and others, by a residence in the hospital, they shall, by an order under their hands, send him to the hospital, and they shall certify the fact of insanity, and also in what city or town he resided, was commorant, or found, at the time of the arrest and examination, and direct detention of the patient in the insane hospital until he shall become of sound mind, or be legally discharged.¹

All commitments made to the insane hospital by the judges of courts, by the mayor and aldermen or selectmen, or by justices, in conformity with any law of the State, must be accompanied by a certificate respecting residence as above, at the time of the original arrest, which certificate shall also state whether the patient was ordered to the hospital on the first or any subsequent process ; and such certificate is made sufficient evidence to render such city or town liable for the expense of committing to, and supporting in the insane hospital such insane person, in the first instance.²

When the friends of the patient or others shall have filed the necessary bond with the treasurer of the hospital, and the patient or his friends are no longer able to support him, new action may be had in the case, in the same manner, and before the same tribunal, as if he had never been admitted to the hospital, with a view to make cities or towns liable to his support ; and no city or town is so liable, unless such new action is had.³

When any insane person shall have been in the insane hospital six months, any friend or person liable for his support, or any city or town supporting such patient, if they consider him unreasonably detained, may apply to two justices of the peace and quorum, whose duty it shall be to inquire into the case, and to summon before them, in the town of Augusta, such testimony as they may deem proper ; and their decision and order shall be binding upon the parties. The justices shall tax the legal costs, and determine who shall pay them. Such application, or appeal, if unsuccessful, shall not be again resorted to, until the expiration of another six months.⁴

¹Acts of 1847, ch. 33, sec. 10.

²Ib. sec. 11.

³Ib.

⁴Ib. sec. 12.

No insane person shall be committed to, or remain in any jail or house of correction in this State, by the provisions of any law of the State, for a longer time than may be necessary to make provision for him in the insane hospital.¹

When any person shall be charged with a criminal offence, any judge of the court before whom he is to be tried, on notice that a plea of insanity will be made, or when such plea is made in court, may, if he deems proper, order such person into the custody of the superintendent of the insane hospital, to be by him detained and observed, until the further order of court, in order that the truth or falsehood of the plea may be ascertained.²

The mayor and aldermen of cities, selectmen of towns, and justices of the peace, sitting, and deciding any of the cases before mentioned, are required to keep a record of their proceedings, and to furnish a copy to any person interested, who may call and pay for the same.³

The justices deciding an appeal, are entitled to receive for their services two dollars a day, and ten cents a mile for travel, and they are to determine which party shall pay the same. And in all cases in which justices have original jurisdiction, they shall charge the same fees as they would by law be entitled to charge in a criminal examination, to be paid by the city, or town, or persons liable in the first instance to pay for committing to and support in the hospital.⁴

Whenever the justices above mentioned order a commitment to the insane hospital, it is made the duty of the mayor and aldermen of the city, or the selectmen of the town in which the insane person resides, or of such other person as the justices may direct, to cause said order to be complied with forthwith, at the expense of said city or town. And said justices shall decide the amount of the expense of said commitment, and certify the same, after the service has been performed.⁵

When any person, indicted for any crime, and acquitted by reason of insanity, or any person who has been arrested by legal process to answer for any crime or offence, against whom the grand jury has omitted to find an indictment for the same reason, has been committed by the court to prison, or the insane hospital, any justice of the su-

¹ Acts of 1847, ch. 33, sec. 14.

² *Ib.* sec. 15.

³ *Ib.* sec. 17.

⁴ *Ib.*

⁵ *Ib.* sec. 18.

preme court, or district court, or any two justices of the peace and of the quorum, within and for the county where such person is kept, may discharge him from confinement, on satisfactory proof, that his going at large will not be dangerous to the safety of the citizens and peace of the State.¹

Upon application of any friend of such insane person, to any justice of either of said courts, or to two justices of the peace and of the quorum within and for the county in which such person is confined, he or they may commit such person to the custody of such friend, such applicant first giving bond, with sufficient sureties, to the judge of probate for said county, conditioned for his safe keeping and for the payment of all damages, which any person may sustain by reason of the acts of such insane person ; such bond to be approved by the justices of the court, or by said two justices.²

Any justice of either of said courts, or any two justices of the peace and quorum within such county, may, on application in writing of the overseers of the poor of the town chargeable with the maintenance of such insane person, order him to be delivered to such overseers, if it shall appear that such town has provided a safe and convenient place for keeping him.³

If the mayor and aldermen of any city, or the selectmen of any town, shall refuse or neglect to inquire and decide within three days after notice, as provided in the eighth section of the act of eighteen hundred and forty seven, on any case of insanity which may exist in their respective cities or towns, or if the justices to whom any appeal shall be made, shall not decide upon such appeal within three days from the time appointed for the hearing thereon, then, in either case, complaint may be made to two justices, and proceedings thereon shall be had as provided in the tenth section of said act.⁴

The authority given by said act to the judge of any court to order any person charged with a criminal offence, and alleged to be insane, into the custody of the superintendent of the insane hospital, may be exercised in case of any such person, who is committed to jail by any justice of the peace, or judge of a municipal or police court, on such a charge, as well as in case of any such person, who is committed to

¹R. S. ch. 173, sec. 3.

²Ib. sec. 4.

³Ib. sec. 5.

⁴Acts of 1848, ch. 79.

answer to an indictment found ; and such authority may be exercised in vacation, or in term time, at the discretion of the court.¹

All the provisions mentioned in this division apply as well to idiots, persons non compos, and persons lunatic or distracted, as to insane persons.²

IX. PROCEEDINGS ON COMPLAINTS FOR BASTARDY.

When any woman, being pregnant with a child which, if born alive, may be a bastard, or who has been delivered of a bastard child, shall accuse any man of being the father thereof, before any justice of the peace, and request a prosecution against the person accused, such justice shall take her examination, on oath, respecting the person accused and the time and place, as correctly as either can be described, when and where the child was begotten, and all such other circumstances, as he may deem useful in the discovery of the truth.³

Such justice may issue his warrant for the apprehension of such person, directed to the sheriff of any county, in which the person accused is supposed to reside, accompanied by such accusation and examination.⁴

When such person is brought before such justice, or any other justice, he may require him to give bond, with sufficient sureties, in such reasonable sum as he shall order, to the complainant, conditioned for his appearance at the next district court to be held in the county in which the complainant resides, and for abiding the order of court thereon.⁵

If the person accused refuse or neglect to give such bond, the justice is required to commit him to the jail of the county of such justice, until bond is given.⁶

The complaint, it will be observed, may be made to any justice of any county, but the trial in the district court is to be had in the county where the complainant resides.

It was not necessary under the statute of eighteen hundred and twenty one, in which the language of the Revised Statutes is substantially employed, that the complainant should allege, in her complaint

¹Acts 1848, ch. 79.

²R. S. ch. 1, sec. 3.

³R. S. ch. 131, sec. 1.

⁴Ib. sec. 2.

⁵Ib. sec. 3.

⁶Ib. sec. 4.

before the magistrate, that the accused she putative father during her travail.¹

If the complainant be under the age of twenty one years, she need not act by guardian.²

If the mother marry before prosecution, the husband should join in the complaint.³

The statute of limitations is no bar to a prosecution under the bastardy act.⁴

The form of complaint may be as follows, though it is not necessary that the accusation and examination be separate instruments :⁵

"To any justice of the peace for the county of C.

Complains A. B. of, &c., and shows that she has been delivered of a bastard child, [or is pregnant with a child, which, if born alive, may be a bastard,] and desires to institute a prosecution against C. D. whom she accuses of being the father of said child."

To this follows the examination to be annexed to the complaint, as follows : "The voluntary examination and accusation of A. B. &c., taken on oath before me, E. F. a justice, &c., who saith that she has been delivered, &c. [or is pregnant, &c.] and accuses C. D. of, &c. of being the father of said child, and that he did beget her with child in P., in the county of C., on or about the day of at, &c. to wit : [here insert such circumstances as the justice shall think necessary for the discovery of the truth of the accusation] and prays that a warrant may issue against the said C. D., and that he may be held to answer this accusation, and further dealt with thereon according to law.

A. B.

Taken, signed and sworn to this day of A. D. 185

Before me, E. F. just. peace."

Form of a warrant, which may be directed to the sheriff of any county in which the person accused is supposed to reside :⁶

" STATE OF MAINE.

Cumberland, ss.

[L. S.] To the sheriff of the county of

Whereas A. B. of, &c. by her accusation and examination hath

¹6 Green. 460.

²18 Maine, 372.

³16 Maine, 38.

⁴Ib.

⁵18 Maine, 304.

⁶R. S. ch. 131, sec. 2.

declared," &c. [setting forth the accusation] "and hath prayed process against the said C. D.

You are hereby required forthwith to apprehend the said C. D. [if in your precinct] and to bring him before E. F. Esq., a justice, to appear and answer to the said accusation, and to do such other matters and things as he may be by law required.

Given under my hand and seal," &c.

If the justice shall order the party accused to find sureties, the bond may be of the form following :

"Know all men by these presents, that we, C. D. of, &c. as principal, and G. H. and J. S. of, &c. as sureties, are indebted to A. B. of, &c. in the just sum of to the payment of which we hereby bind ourselves, our executors and administrators.

Witness our hands and seals. Dated, &c.

The condition of this obligation is such, that whereas the said A. B. hath, on her examination taken before E. F. Esq. a justice, &c. on the day, &c. accused the said C. D. of being the father of a bastard child of which she hath been delivered [or "of a child of which she is pregnant and which if born alive," &c.] "and the said justice hath issued a warrant against the said C. D. to answer to said accusation, and the said C. D. hath appeared and answered to the same, and the said justice hath required him, the said C. D., to give bond with sufficient sureties to appear and answer to said complaint at the next district court, to be holden, &c. and to abide the order of court thereon :

Now if said C. D. shall appear and answer to said complaint at said term of court, and shall abide the order of court thereon, then this obligation shall be void : otherwise," &c.

Form of the mittimus for commitment :

"STATE OF MAINE.

Cumberland, ss.

[L. s.] To the keeper of the jail in said county.

Whereas A. B. of —, hath, on her examination taken, &c. accused C. D. of —, of being the father, &c., and a warrant hath been issued by me against the said C. D. to answer to the said accusation, and the said C. D. hath appeared and answered to the same, and hath been required to give bond with sufficient sureties, &c. and hath not yet given such bond :

You are hereby required to receive said C. D. into your custody in said jail, and him there safely to keep until he shall give such bond, or be otherwise discharged by due order of law.

Given under my hand and seal," &c.

The accusation and examination must accompany the warrant.¹

X. PROCEEDINGS IN PENAL ACTIONS.

The law attaches to the committing or omission of many acts, not in themselves morally wrong, a forfeiture, for the public good.

These offences, where the remedy to be applied is the action of debt, and the forfeiture does not exceed twenty dollars, come properly within the civil jurisdiction of justices of the peace.²

The various acts which are the subject of forfeitures must be sought in the statutes of the State. The limits of this book will not permit their enumeration here.

Generally, the remedy in each particular case is pointed out by the statute creating the offence, whether by action of debt, complaint, or indictment; and also the person or body, in whose name the proceedings are to be had, as well as the person, &c., to whose use the amount recovered is to be applied.

All penalties may be recovered by action of debt where no other form of action or proceeding is prescribed in the statute, imposing such penalties.³

All fines and forfeitures, imposed as a punishment for any offence, or for a violation or neglect of any duty imposed by statute, where no other appropriation thereof is expressly made by law, shall accrue to the State; and all such given or limited by law, in whole or part to the use of the State, may be recovered by indictment in the district court, when no other mode is expressly provided.⁴

Another general rule in these cases is, that the action can be brought in the name of no person or corporation, unless such person or corporation is by some statute provision expressly or by implication authorized to sue for the same.⁵

It seems, that where a penalty is given wholly to one or more per-

¹R. S. ch. 181, sec. 2.

²R. S. ch. 116, sec. 1.

³R. S. ch. 115, sec. 21.

⁴R. S. ch. 162, secs. 13, 14.

⁵1 Met. 232.

sons, such person or persons will be considered to be, by implication, authorized to sue for it in his or their own name.¹

When any forfeiture is recoverable in any civil action, the same must be brought in the county in which the offence was committed, unless a different provision is made in the statute imposing the same ; and if on trial, it does not appear, that it was committed in the county where the action is brought, the verdict is to be for the defendant.²

¹1 Met. 334

²R. S. ch. 114, sec. 14.

CHAPTER XIII.

OF MISCELLANEOUS PROCEEDINGS.

I. DEPOSITIONS.

1. *Depositions in causes pending.* Depositions may be taken to be used in all civil suits or causes, petitions for partition of land, libels for divorce, prosecutions for the maintenance of bastard children, petitions for review, and in trials before arbitrators, referees and county commissioners, in cases of libel for forfeited goods, in prosecutions before courts martial, and in cases of contested elections.¹

Any justice of the peace, and any notary public, may take depositions, to be used in any pending cause, he not being interested in such cause, nor being, nor having been, counsel or attorney in the same.²

No suit, petition, libel, or prosecution, is considered as pending, till the writ, petition, libel or other process, shall have been duly served upon the respondent, or such notice, as is required by law, or ordered by the court, shall have been duly given; and no deposition can be used in the trial of any such cause, unless the notice required by law shall have been duly given to the adverse party.³

Depositions to be used in pending actions may be taken for either of the following causes:

1. When the deponent is so aged, infirm, or sick, as not be able to attend court, or at other place of trial;
2. When the deponent resides out of, or is absent from the State;
3. When the deponent shall be bound to sea on a voyage, or is about to go out of the State by sea or land, before the session of the court, where the deposition is to be used, and not expected to return in season to attend the trial;
4. When the deponent lives more than thirty miles from the place of trial, or when he resides in any city, town or place other than that

¹R. S. ch. 132, sec. 12—Ib. ch. 16, sec. 119—
Ib. ch. 133, secs. 1, 24.

²Ib. sec. 2.
³Ib. sec. 3.

in which the trial is had, provided, in the latter case, the deposition shall not be used, nor the cost of taking taxed, if a party objecting to its use summon the deponent to appear at the trial, and he be present so that his testimony can be taken orally.¹

5. When the deponent is confined in prison, and such imprisonment shall be continued, until after trial of the cause.²

6. As to "allegations additional" made by a party claiming, under an assignment, property attached in trustee process.³

On application of either party to a justice of the peace, or notary public, for the purpose of procuring the deposition of a witness, such justice or notary may issue a summons to the deponent to appear before him at a designated place and time, to give his deposition; and also issue notice to the adverse party, to be present at such time and place, if he should see fit; or such notice to the adverse party may be made returnable before any other justice or notary.⁴

The notification to the adverse party must be served on him or his attorney, by reading the same to him in his presence and hearing, or by giving to him, or leaving at his last and usual place of abode, an attested copy thereof; and the service may be made by a sworn officer, or by any other person, and proved by his affidavit.⁵

No person is, for the above purpose, to be considered the attorney of another, unless he has indorsed the writ, or indorsed his name on the summons left with the defendant, or appeared for his principal in the cause, or given notice in writing that he is attorney of such adverse party.⁶

When there are several persons, plaintiffs or defendants, a notice served on either of them shall be sufficient.⁷

The justice or notary may give verbal notice to the adverse party.⁸

No written notice (and probably no verbal notice) is valid, unless the adverse party be allowed between the service of the notice and the time appointed for taking the deposition, time for him to travel from his usual place of abode to the place of caption, not less than at the rate of one day for every twenty miles travel, exclusive of Sunday.⁹

¹Acts of 1849, ch. 123.

²R. S. ch. 133, sec. 4—Acts of 1842, ch. 31, sec. 16.

³R. S. ch. 119, sec. 40.

⁴Acts of 1849, ch. 119—R. S. ch. 133, sec. 5.

⁵Ib. sec. 6.

⁶Ib. sec. 7.

⁷Ib. sec. 8.

⁸Ib. sec. 10.

⁹Ib. sec. 9—Acts of 1842, ch. 31, sec. 17.

Whether a notice of less than one day is sufficient, where the distance from the place of caption to the residence of the adverse party is less than twenty miles, may be considered an open question. The impression among the members of the legal profession, so far as we are acquainted with it, is that such a notice is sufficient.

The notice to the adverse party, if in the State, must be, in substance, as follows :

" —, ss. To — —, of —, in the county of —.

Greeting :

Whereas A. B. of —, has requested, that the deposition of —, may be taken to be used in an action of — pending between you and the said A. B., and the — of — in —, and the — day of —, at — of the clock in — noon, are the time and place appointed, for said deponent to testify what he knows relating to said action ; you are hereby notified that you may be present and put such questions, as you may think fit. Dated this — day of — 18 .
— — Justice of the Peace."

The justice of the Peace or notary public, when requested, is also to issue a summons to the deponent, in substance as follows :

" —, ss. To C. D. of —, in the county of —.

Greeting :

Whereas A. B. of —, in the county of —, has requested me to take your deposition, to be used in an action, now pending between him and E. F. of —, in the county of —, and the — of — in the town of —, and the — day of —, at — of the clock in the — noon, are the time and place, appointed to take the same deposition ; you are therefore required, in the name of the State of Maine, then and there to appear, to testify what you know, relating to said action.

Dated this — day of — in the year —

— — Justice of the peace."

This summons may be served, and the service of it proved, as described in the case of the notification to the adverse party.²

Witnesses may be compelled to attend and give their depositions, in like manner, and under the same penalties, as when summoned to

¹R. S. ch. 123, sec. 11.

²Ib. sec. 12.

attend as witnesses in court, without regard to the distance of their place of abode from the place of caption ; but no witness can be compelled to travel, for the purpose of giving his deposition, more than thirty miles.¹

The mode of proceeding to compel the attendance of witnesses may be found at page sixty nine of this volume.

The deponent being in attendance, must be first sworn, or affirmed, to testify the truth, the whole truth, and nothing but the truth, relating to the cause or matter for which the deposition is to be taken ; and he is then to be examined, first by the party producing him, on verbal or written interrogatories, and then by the adverse party, and by the justice, or the parties, afterwards, if they see cause.²

The deposition is to be written by the justice or notary, or by the deponent, or by some disinterested person in the presence and under the direction of the justice or notary ; and after it has been carefully read to, or by the deponent, it shall then be subscribed by him.³

The interrogatories to the deponent may be written by the party or his attorney, being no part of the "deposition."⁴

The justice or notary, the deposition being completed, makes out his certificate, and annexes it to the deposition. He should carefully state in such certificate the following facts :

1. That the deponent was sworn according to law, and when ;
2. By whom the deposition was written ;
3. If it was written by the deponent, or some disinterested person, he must name him, and that he wrote it in the presence and under the direction of the justice or notary ;
4. Whether the adverse party was notified to attend ;
5. Whether he attended, or not ;
6. The cause in which the deposition is to be used, and the names of the parties thereto, the meaning of "cause" being rather the name of the action, than the kind or nature of the particular action ;⁵
7. The court or tribunal in which such cause is to be tried ;
8. The place and time of trial ;
9. The cause of taking the deposition.⁶

¹R. S. ch. 183, sec. 13.

²Ib. secs. 15, 38.

³Ib. sec. 16.

⁴25 Maine, 243.

⁵28 Maine, 22.

⁶R. S. ch. 183, sec. 17.

The form of certificate may be as follows :

— ss. — 185—.

The aforesaid deponent was first sworn according to law, on the — day of — 185— to the aforesaid deposition, by him subscribed this day ; the same was written by — —, in my presence, and under my direction ; the adverse party was notified to attend and did attend. This deposition is to be used in an action, in which the said — —, is plaintiff and the said — —, defendant, now pending in the — court, within and for said county of —, and there to be heard and tried on the — day of —, A. D. 185— ; and the said deponent [here state the reason] is the cause of taking the same deposition.

Justice of the peace.

| | | |
|---|---------|----|
| <i>Justice's fees</i> —Deposition | - - | 20 |
| Writing two pages | - | 24 |
| Travel, | - - - - | 50 |
| <i>Officer's</i> “ Service of notifications | | |
| <i>Deponent's</i> “ Travel two miles | - - | 16 |
| Attendance one day | - | 50 |

The deposition must be delivered by the justice to the court or referee, before whom the cause is to be tried, or be enclosed and sealed up by him, and directed to such court or referees, to be kept sealed, till opened by their order.¹

The direction may be thus :

“ To the hon. the district court for the — district, (or the Supreme Judicial Court) next to be holden, &c., (or to J. M. &c., referees,) the deposition of E. F. to be used in an action now pending, &c., taken and sealed up by me the — day of — A. D. 185—.

Justice of the peace.”

Objections to the competency of a deponent, or to the propriety of any questions proposed to him, or answers given by him, will, of course, be written down by the magistrate at the request of any party.

2. *Depositions in perpetuum.* When any person wishes to perpetuate the testimony of any witness, to be used in the trial of any cause pending, or afterwards commenced, he may make a statement in writing, under oath, briefly setting forth, in substance, his title, interest, or claim in, or to the subject, to which the desired testimony

¹R. S. ch. 133, sec. 18.

relates, and the names of all persons who are supposed to be interested therein, and the name of each witness proposed to be examined. Such statement is to be delivered to any judge or register of probate, notary public, clerk of the supreme court, or justice of the peace and quorum, requesting the person selected to take the deposition of such witness.

The person so selected, shall cause notice to be given of the time and place of taking such deposition, to all persons named in the statement as interested, such notice to be given and proved as in case of taking depositions in actions pending.*

The deponent is to be sworn and examined, and the deposition written, read and subscribed in the same manner as depositions taken to be used in actions pending ; and the person taking such deposition is to annex to it a certificate, under his hand, at the time of taking it ; and that it was taken in perpetual remembrance of the thing ; and is to insert in such certificate the name of the person at whose request it was taken, and of all those who were notified to attend, and of such as did attend.†

The statement, deposition and certificate must, within ninety days after taking it, be recorded in the registry of deeds of the county, where the land or any part of it lies, if the deposition relates to real estate ; and if not, then in the county where the parties, or some of them, reside.‡

Justices of the peace and of the quorum have power to compel the attendance of persons summoned to appear before them to give their depositions to be used in any cause pending in this or any other State, or to perpetuate their testimony, and also to compel them to depose, being brought before them.

When the summons has been served and returned, and proof of service is entered upon the summons, and his legal fees tendered to the witness a reasonable time before the day appointed for taking his deposition, and he shall refuse to attend, the justice may adjourn the time of taking the deposition to a future hour or day, such as may be convenient, and issue a *capias*, directed to a proper officer, to apprehend such witness, and bring him before him at the time and place to which the adjournment was ordered.§

*R. S. ch. 133, secs. 25, 26.

†Ib. sec. 27.

‡Ib. sec. 28.

§Ib. sec. 36.

The form for a *capias* will be found among the forms in civil proceedings in this volume.

If the witness, being brought before the justice, shall refuse to depose and answer such question, as may be propounded to him by either of the parties interested, under the direction of the justice, he may commit him to the prison of the county for contempt, in like manner as the superior courts might commit a witness refusing to testify in open court.¹

Mortgagees, and persons claiming under them, may be compelled to give their depositions in perpetuum, in certain cases, in relation to the amount due on the mortgage, and the condition of it; and justices of the peace have the same power, in such cases, as in taking other depositions in perpetuum.²

The form of the "statement" above referred to may be as follows :

"STATE OF MAINE.

Cumberland, ss.

To A. B., a justice of the peace and of the quorum within and for said county :

The statement of W. A. S. of W. &c. respectfully shows that [here set forth his title, claim or interest, &c.] that he is desirous of perpetuating the evidence of E. L. E. respecting it, and that W. F. is the only person known to him to be interested, or by him supposed to be interested, in the subject matter about which he is desirous of perpetuating the evidence of the witness aforesaid. Wherefore said W. A. S. requests you, the said justice, to take the deposition of said E. L. E., to be preserved in perpetual remembrance of the thing, to fix the time and place therefor, and to notify said W. F. thereof, and to take such other measures as the law in such cases may require. Dated, &c.

Cumberland, ss. — 185—.

Sworn to before me,

E. F., just. peace."

II. OF RECEIVING THE ACKNOWLEDGEMENT OF DEEDS, AND PROVING EXECUTION WHERE A PARTY REFUSES TO ACKNOWLEDGE.

The fact of the acknowledgment of a deed must always appear on the face of it, and cannot be proved by parol evidence.³

¹R. S. ch. 133, sec. 37.

²Ib. sec. 43.

³R. S. ch. 91, sec. 24.

This is usually done by a certificate thereof at the foot of the deed, in the following form :

C —, ss. A. D. 18 —. Then personally appeared the above named F. H. D., and acknowledged the above instrument to be his free act and deed before me. C. D. B., justice of the peace.

Where the execution is by attorney, the form should be varied thus :

Then personally appeared the above-named G. H. D. [the attorney,] and acknowledged the foregoing instrument to be the free act and deed of said H. D. [the principal.]

If it be a corporation, thus :

Then personally appeared the [name of the corporation,] by J. F. its agent, and acknowledged, &c.

It sometimes becomes the duty of a justice to take the acknowledgment of deeds conveying lands in other States. In many States, but not in Maine, the wife, if she executes the deed, is to be separately and privately examined respecting the free execution of the deed. The certificate may show that fact thus :

Then personally appeared the said C. J. G., who was examined by me separately and privately, and apart from her husband, and acknowledged, &c.

By our statutes, the acknowledgement of one of several joint grantors is sufficient.¹ We are not aware whether this provision extends to other States or not. The safest way is, in all cases of deeds of land out of the State, to take the acknowledgment of all the grantors.

If any grantor refuses to acknowledge his deed, the grantee, or person claiming under him, may leave with the register of deeds a true copy thereof; and such copy, so left in his office, is taken to be a caution to all persons for forty days, and during that time it has the same effect as recording the deed.²

If any grantor shall refuse to acknowledge his deed, the grantee, or any person claiming under him, may apply to any justice of the peace in the county where the land lies, or where the grantor resides, who may summon the grantor to appear at a certain time and place before the said justice, to hear the testimony of the subscribing witnesses to the deed; which summons shall state the date of the deed, the names

¹R. S. ch. 91, sec. 16.

²Ib. sec. 20.

of the parties thereto, and of the subscribing witnesses, and shall be served seven days before the time assigned for proving the deed.¹

The application to the justice may be in the form following :

“ To A. B., a justice, &c.

Respectfully shows J. M. &c. that on the — day, &c. W. A. S. executed and delivered the deed herewith filed, in the presence of the subscribing witnesses thereto, [and if there are mesne conveyances, add, and that he claims under the same] and now refuses to acknowledge the same. Wherefore he prays that a summons may be issued to the said W. A. S. to appear at a certain time and place before your honor, to hear the testimony of the subscribing witnesses to said deed.”

The summons may be in the following form :

“ STATE OF MAINE.

C. — ss.

[L. s.] To W. A. S. &c. Whereas J. M. has applied to me, stating that a deed dated the — day of — 18—, the names of the parties to which deed are — of — in the county of —, grantor, and — of — in the county of —, grantee, and the names of the subscribing witnesses —, was duly executed and delivered in the presence of the subscribing witnesses thereto, [and, if the fact be so, that he claims under the same] and that you, the said W. A. S., refuse to acknowledge said deed, and it appearing to my satisfaction that such statement is true, you are therefore summoned to appear before me at, &c. — on, &c. — at — o'clock, &c., then and there to hear the testimony of the subscribing witnesses to said deed, and show cause if any you have, why the due execution of said deed should not be proved.

Given, &c.

G. W.R., justice of the peace.”

At such hearing, it being made to appear by the testimony of such witnesses, that they saw such deed duly executed by the grantor, and such being satisfactory to such justice, he shall so certify thereon, and in his certificate shall state the presence or absence of the grantor, as the fact may be.²

The certificate may be as follows :

C — ss. &c. J. M. of, &c. having made application to me stating, &c. [set forth the application and prayer,] and a summons having been

¹R. S. ch. 91, sec. 21.

²Ib. sec. 22.

thereupon issued and duly served upon the said W. A. S. to appear at a certain time and place therein mentioned, to hear the testimony of the subscribing witnesses to said deed, and show cause, if any he had, why the due execution thereof should not be proved, I thereupon proceeded at the time and place appointed to hear the testimony of J. H. H., one of the subscribing witnesses, [and other evidence] and the due execution of said deed was then and there proved to my satisfaction. The said W. A. S. was [or was not] present at said hearing.

G. W. R. justice of the peace.

No deed made since July 31, 1841, can be proved in the manner above stated, if it has not, at least, one subscribing witness.¹

An acknowledgement of a deed cannot be made before the grantee of the deed.²

The acknowledgement of a deed may be made before any justice of the peace in the State, or any justice of the peace, magistrate or notary public within the United States, or any commissioner appointed for that purpose by the governor of this State, or before any minister or consul of the United States, or notary public in any foreign country.³

III. OF REFERENCE OF DISPUTES.

All controversies, which may be the subject of a personal action, may be submitted to one or more referees, as follows ;⁴

The parties may appear, personally or by attorney, before a justice of the peace, and there sign and acknowledge an agreement, in substance, as follows :

“ Know all men by there presents that —, of —, in the county of —, and — of —, in the county of — have agreed to submit the demand, made by the said —, against the said —, which is hereunto annexed” (and “all other demands between the parties,” as the case may be,) “to the determination of —; the report of whom, (or the major part of whom) being made within one year from this date, to the district court for the said county of —, the judgment thereon shall be final. And if either of the parties shall neglect to appear before the referees, after proper notice given to them of the

¹Ib. sec. 23.

²20 Maine, 413.

³R. S. ch. 91, sec. 17.

⁴R. S. ch. 135, sec. 1.

time and place appointed by the referees for hearing the parties, the referees may proceed in his absence.

"Dated this — day of —, in the year —.

This agreement, having been subscribed by the parties, is to be acknowledged by them, or their attorneys, as their voluntary act, before the same or any other justice.¹

The acknowledgement may be as follows :

C —, ss. —, 185—.

Then the abovenamed —, and —, (or the abovenamed — personally, and the said —, by the said —, his attorney, as the case may be,) appeared, and acknowledged the above instrument by them signed, to be their voluntary act.

Before me, —, Justice of the peace."

If all demands between the parties are submitted to the decision of the referees, no specific demand need be annexed to the agreement.²

If a specific demand only is submitted, the same shall be annexed to the agreement, and signed by the party making it ; and such demands are required to be stated in such a manner as to be readily understood and be as certain, in substance, as the case will admit.³

Neither party has power to revoke the submission, without the consent of the other.⁴

The parties may, if they are so disposed, agree upon the time when the report shall be made, and vary the form accordingly.⁵

The acknowledgement of the parties to the submission may be taken by either of the referees, if he is a justice of the peace⁶

IV. RECOGNIZANCES FOR DEBT.

Any person, capable of binding himself by a common bond, may enter into a recognizance, in the manner hereinafter mentioned, for the payment of any debt that he may owe, and may thereby subject his person, goods and estate, to be taken in execution for such debt.⁷

The recognizance may be taken before any justice of the peace, and must be in substance as follows :

"I, A. B., of —, in the county of —, do owe unto C. D., of —, in the county of —, the sum of —, to be paid to the

¹R. S. ch. 138, sec. 2.

²Ib. sec. 3.

³Ib. sec. 4.

⁴Ib. sec. 5.

⁵Ib. sec. 6.

⁶Ib. sec. 14.

⁷R. S. ch. 137, sec. 1.

said C. D. on the — day of —; and if I shall fail of the payment of said debt, at the time aforesaid, I will and grant that the said debt shall be levied of my goods and chattels, lands and tenements, and in want thereof, upon my body.

In testimony whereof, I have hereunto set my hand and seal, this — day of — in the year —.”¹

Such recognizance, being signed, sealed, and acknowledged before the justice, and his certificate thereof signed by him, is to be delivered to the creditor or conusee; and the justice is to make and keep a record of the recognizance.²

If the debt is not paid at the time appointed, and the creditor desires an execution upon the recognizance, he may deliver the same to the clerk of the district court of the county, in which the same was taken, and the clerk is to record the same, and place the original on the court files.³

The magistrate has nothing further to do with the proceeding.

V. OF WATCH AND WARD.

The justices of the peace resident in any town, together with the selectmen of any town, have power from time to time to direct and order suitable watches to be kept, nightly, in such town, from such hour in the evening, as they shall appoint, until sun rising in the morning; also wards to be kept in the day time and evening, whenever they shall think such watches and wards necessary. Such justices and selectmen may designate the time, place and number of persons to be employed in any such watch and ward; and they may give orders, in writing accordingly, signed by a major part of such justices and selectmen, directed to any constable of the town, requiring him from time to time to warn such watch and ward, and to see that all persons so warned, attend and perform their duty in the manner required; and in the warning thereof to take care that some able householders, or other sufficient persons, be joined in each watch and ward.⁴

Every male person, of the age of twenty one years, and upwards, being able of body, or having estate sufficient to hire a substitute, and not being a minister of the gospel, is, when duly warned, liable to watch and ward in his town, either in person or by a sufficient substi-

¹R. S. ch. 137, sec. 2.

²Ib. sec. 3.

³Ib. sec. 4.

⁴R. S. ch. 81, sec. 2.

tute, unless such person reside more than two miles from the place where the watch and ward is kept.¹

Whenever the said justices of the peace and selectmen shall think fit to walk by night, to inspect the order of the town, wherein they dwell, or shall depute any portion of their number for that purpose, such of the constables and watchmen are required to attend them, or said deputation, as they may require so to do ; and they are to obey their lawful commands.²

VI. DEMANDING LICENSES OF PEDLARS.

The Statute of 1846, ch. 200, § 5, provides that every hawker and pedlar, whenever his license is demanded of him by a justice of the peace, shall forthwith exhibit the same. After making such demand, the justice should make a minute thereof in his book of records of justice proceedings, something in the manner following :

“C.—ss. A. D.185—, I this day demanded of —, a hawker and pedlar, his license, which he forthwith exhibited, [or which he neglected and refused to exhibit.] Attest, A. B., justice of the peace.”

VII. SOLEMNIZING MARRIAGES.

In performing this branch of the duties of his office, the first question which arises to the magistrate upon parties presenting themselves for the ceremony is, whether they have a right by law to be married ; because there is a heavy penalty when a justice wilfully unites persons, contrary to law.

Marriage is entirely forbidden in the following cases :

No man shall marry his mother, grandmother, daughter, granddaughter, step-mother, grandfather's wife, son's wife, grandson's wife, wife's mother, wife's daughter, wife's granddaughter, sister, brother's daughter, sister's daughter, father's sister, or mother's sister.³

No woman shall marry her father, grandfather, son, grandson, step-father, grandmother's husband, daughter's husband, granddaughter's husband, husband's father, husband's grandfather, husband's son, husband's grandson, brother, brother's son, sister's son, father's brother, or mother's brother.⁴

¹R. S. ch. 31, sec. 1.

²Ib. sec. 10.

³R. S. ch. 87, sec. 1.

⁴Ib. sec. 2.

No white person shall intermarry with any negro, indian, or mulatto; and no insane person or idiot is capable of contracting marriage.¹

All marriages contracted while either of the parties has a former wife or husband living, are void, unless the former marriage shall have been dissolved by a decree of divorce.²

All persons resident in this State, intending to be joined in marriage, must have their intentions published at three public religious meetings, on different days, at three days' distance, exclusively, at least, from each other, in the city, town or plantation, where they respectively dwell; or have such intentions posted up by the clerk of such town or plantation, fourteen days, in some public and conspicuous place therein, and deliver a certificate of such publishment, under the hand of the town or plantation clerk, to the minister or justice of the peace, solemnizing the marriage.³

When a male under twenty-one years, or a female under eighteen years of age, is to be married, the consent of the parent, guardian, or other person, having the care and government of such party, if within the State, shall be first obtained.⁴

If the parties, or either of them, live in a town or place, where there is no clerk, publishment must be made, as above directed, in the adjoining town or plantation, and a certificate of such clerk must be obtained before marriage.⁵

When the justice is satisfied that the parties have a right to be married, it is his duty to proceed with the ceremony. No particular form is prescribed by law, and it would undoubtedly be sufficient if the parties were to make the mutual engagement in the presence of the justice, he assenting in his official character.⁶ Custom has farther prescribed certain contracts to love upon the one side, and to obey on the other. But, as such promises would be implied from the very nature of the engagement, the magistrate may omit them altogether, and simply receive their mutual promises to accept each other as wedded wife, and lawful husband. After this, he should pronounce them to be husband and wife, which completes the ceremony.⁷

¹R. S. ch. 87, sec. 3.

²Ib. sec. 4.

³Ib. sec. 6.

⁴Ib. sec. 7.

⁵Ib. sec. 8.

⁶7 Mass. 54.

⁷Ib.

Every justice of the peace, and minister of the gospel commissioned to solemnize marriages, is required to keep a record of all marriages solemnized by him, and within one year after the date of each marriage, to make a return to the clerk of the town or plantation, in which the marriage is solemnized, certifying the names of the parties so married by him, and the place or places of their residence, and the date of the marriage; and for any neglect to comply with this requisition, such justice or minister forfeits the sum of fifty dollars, one half to the use of the county, and the other half to the person suing for the same.¹

Every justice appointed for any particular county, and in which he resides, may solemnize marriages in such county, where either of the parties resides; and every justice appointed for each and every county in the State, may solemnize marriages in any county where either of the parties resides.²

For knowingly and wilfully joining persons in marriage contrary to the provisions above mentioned, the justice or minister so doing shall forfeit the sum of one hundred dollars; and every justice or minister, against whom recovery of such fine may be had, is forbidden from joining any persons in marriage afterwards;³ and if after being so forbidden, such justice or minister shall join any persons in marriage, on conviction thereof upon indictment, he shall be punished by confinement to hard labor in the State's prison for a term not exceeding five years, or by fine not exceeding one thousand dollars.⁴

Any person not authorized to marry, who shall join persons in marriage, is subject to like punishment.⁵

If parties are joined in marriage by persons unauthorized, but professing to be authorized, the marriage is valid, providing the marriage is consummated with a full belief on the part of the persons married, or either of them, that they have been lawfully married.⁶

When the banns of matrimony between any persons are forbidden, and the reasons assigned in writing by the person forbidding, and left with the town or plantation clerk, he is forbidden to issue his certificate, until a decision is made by two justices of the peace of the same county, approving the marriage, after due notice to, and hearing of, all concerned; providing the person forbidding the banns, shall, within

¹ Act of 1846, ch. 190.

² R. S. ch. 87, sec. 11.

³ *Ib.* sec. 14.

⁴ *Ib.* sec. 15.

⁵ *Ib.*

⁶ *Ib.* sec. 18.

seven days after filing his reasons, procure the decision of such justices, unless they shall certify that further time is necessary for the purpose, in which case a certificate is to be withheld, until the expiration of the certified time. The clerk is to govern himself by the decision of the justices ; and if the decision be against the person forbidding, he is to pay all costs to the persons whose marriage he has forbidden ; and the justices are to enter judgment therefor, and issue execution accordingly.¹

VIII. WARRANT FOR ABATING NUISANCES.

When upon indictment, complaint, or action, any person may be adjudged guilty of a nuisance, the court, or magistrate, before whom such conviction may be had, no appeal being made, may, in addition to the fine imposed, if any, or to the judgment for damages and costs, for which a separate execution is to issue, order that said nuisance be abated, or removed at the expense of the defendant ; and after inquiring into and estimating, as near as may be, the sum necessary to defray the expense of such abatement, a warrant therefor may be issued substantially in the form following :

"STATE OF MAINE.

C.—, ss. To the sheriff of our said county of C., or either of his deputies ;

Greeting :

[L. s.] Whereas, by the consideration of me, —, a justice of the peace within and for said county, at a court held at —, within said county, on the — day of — 185—, C. D. of —, was, upon indictment, (or complaint, or action in favor of E. F., as the case may be,) adjudged guilty of erecting, [causing, or continuing] a certain nuisance, being a building in said —, and for —, (or fence, or other thing, describing particularly the nuisance and place,) which said nuisance was ordered by me to be abated and removed : You are therefore commanded forthwith to cause said nuisance to be abated and removed ; and also to levy of the materials by you so removed, and of the goods, chattels and lands of the said C. D., a sum sufficient to defray the expense of removing and abating the same, not to exceed the sum of — dollars, (the sum estimated by the magistrate,)

¹R. S. ch. 87, sec. 9.

²R. S. ch. 164, sec. 9.

together with your lawful fees, and thirty three cents more for this writ. And, for want of such goods and estate to satisfy the sums aforesaid, you are commanded to take the body of the said C. D., and him commit unto our jail in P. in said county, and there detain him till he pay the sums aforesaid, or be legally discharged. And make return of this warrant, with your doings thereon, within thirty days. Witness my hand and seal this —— day of ——, 185—.

Justice of the peace.”

Instead of issuing the said warrant, the justice may order the same to be stayed, upon motion of the defendant, and upon his entering into recognizance, in such sum, and with such surety, as the justice may direct, in case of indictment, to the State, or, in case of a complaint, or action, to the plaintiff, conditioned, either that the defendant will discontinue said nuisance, or that, within a time limited by the justice, and not exceeding six months, he will cause the same to be abated and removed, as either shall be directed by the justice : and upon his default to perform the condition of the recognizance, the same shall be deemed forfeited, and the justice, upon being satisfied of such default, may forthwith issue such warrant, and *scire facias* on such recognizance.¹

These proceedings apply to the erecting, causing, or continuing nuisances, as described in the chapter of the Revised Statutes referred to in the note, or at common law, where the same has not been modified or repealed by statute, whether the same be a common and public nuisance, or a private nuisance, being one that is an injury to particular individuals only ; and the party injured may proceed, by complaint, or action on the case for recovery of damages, as well as, in appropriate cases, by indictment.²

IX. PROCEEDINGS IN CASES OF INFECTION.

When any infectious or malignant distemper is known to exist in any place out of the State, the selectmen of any town in the State may, if they see cause, and by giving public notice in such town, in such mode as they may find convenient, require all persons coming from such place out of the State, to inform one of the selectmen, or the clerk of

¹R. S. ch. 164, sec. 10.

²R. S. ch. 164, secs. 1, 8.

such town, of their arrival, and from what place. And any person who is required so to give notice, may be prohibited by the selectmen from going to any part of such town where they may judge it unsafe for the inhabitants for him to go. If he shall not choose to comply with such prohibition, it is his duty, unless disabled by sickness, forthwith to depart from the State, in such manner and by such way, as the selectmen shall direct ; and in case of neglect or refusal, any justice of the peace in the county, on complaint of either of said selectmen, may, by his warrant to the proper officer, or other person named in said warrant, cause such person to be removed out of the State.¹

Justices of the peace for counties bordering upon any adjoining State or province, where there are supposed to be places infected, may licence persons coming into the State from such places to travel in the State.²

Any two justices of the peace may, if need be, make out a warrant, directed to the sheriff of the county or his deputy, or to any constable, requiring him, under the direction of the selectmen of the town, where any person infected with contagious sickness may be, to remove such person ; or to impress and take up convenient houses, lodging, nurses, attendants and other necessaries, for the accommodation, safety and relief of the sick.³

Whenever, on the application of the selectmen of any town, it shall be made to appear to any justice of the peace, that there is just cause to suspect that any baggage, clothing, or goods of any kind, found within such town, are infected with any malignant, contagious distemper, such justice shall, by warrant, directed to the sheriff or his deputy or to any constable, require him to impress so many men as said justice shall judge necessary, to secure such infected articles, and to post said men as a guard over the house or place where such articles shall be lodged. The said justice may also, by said warrant, if it appear to him necessary, require the said officers, under the direction of the said selectmen, to impress and take up convenient houses or stores, for the safe keeping of such infected articles, and the same to cause to be removed to such houses or stores, or otherwise detained, until, in the opinion of said selectmen, they shall be freed from infection.⁴

¹R. S. ch. 21, secs. 2, 3.

²Ib. sec. 5.

³Ib. sec. 6.

⁴Ib. secs. 7, 8.

The provisions before mentioned are extended to organized plantations, and the assessors of such plantations are required to do the duties of, and have the same powers as, the selectmen of towns in their towns.¹

X. PROCEEDINGS IN REMOVING PAUPERS.

Persons actually chargeable to the places wherein they are found, but in which they have no lawfully settlement, may be removed to the places of their lawful settlement, if they have any within the State.²

In order to effect such removal, and also to recover the expenses incurred for the relief of such persons, the overseers may apply, by complaint, to any justice of the peace in their county, not an inhabitant of their town; and the said justice is authorized to issue his summons, to be served as other civil processes may be, upon the inhabitants of the town, where the person's settlement is alleged to be, and also upon the party, whose removal is contemplated, and upon such witnesses as he may see fit. The said justice may examine the party to be removed, under oath, and may compel his attendance for that purpose, by warrant, if he see cause. He shall hear his objections to such removal, and for good causes may continue the process, one or more times, not exceeding three months in all, and after due examination and hearing, whether the town summoned appears or not, shall proceed to give judgment for or against the complainants, and make record thereof.³

In such cases, costs shall be awarded in favor of the prevailing party, except that, in case of default, the town summoned shall not be entitled to costs; and the record shall state the determination of the justice, as to the town where the party intended to be removed has his legal settlement, and as to his removal, and whether for being actually chargeable, and the damages for expenses incurred by said town making complaint, and also the estimated expenses of removal, if such removal shall be ordered, in addition to the costs above mentioned.⁴

Upon judgment of removal, the justice, within three months and not afterwards, may issue his warrant of removal, directed to the sheriff of the county or his deputy, the constable of the town where the pauper is to be removed, or to any individual by name, or to all or any of

¹R. S. ch. 21, sec. 38.

²Ib.

³R. S. ch. 32, sec. 35 Acts 1846, ch. 211. ⁴R. S. ch. 32, sec. 36.

them, to be served ; also requiring the overseers of the town to which such person is to be sent, to receive and provide for him, as an inhabitant of that town, a copy of which warrant is to be served on some one or more of said overseers.¹

The justice may also award execution, as in other cases, for the damages, costs, and estimated expenses of removal ; and the execution may be directed to any officer in the county qualified to serve executions in civil actions.²

Either party, in such cases, may appeal, including the pauper ; but the latter must enter into the usual recognizance.³

Depositions may be used in these proceedings for any cause authorized in other civil actions.⁴

The process shall not abate, so far as respects the damages and costs, by the death of the pauper, pending the suit.⁵

Upon the complaint of the overseers of any town, any justice of the peace may, by warrant directed to, and to be executed by any constable, or any other person therein designated, cause any pauper, having no lawful settlement in this State, to be sent and conveyed, at the expense of the town, by land or water, to any other State, or to any place beyond sea, where he may belong, if the justice thinks proper, and if he may be conveniently removed.⁶

Intemperate poor may be sent to the house of correction by any justice, on complaint of the overseers.⁷

Any justice may, on complaint of a majority of the overseers of any city or town, cause to be detained and sold, by warrant duly issued, vessels, whose masters have not complied with the provisions of section 56 and 59, chapter 132, of the Revised Statutes.

The above provisions apply to cities and their officers, as well as to towns.⁸

XI. OF ADMITTING PRISONERS TO BAIL.

In all cases where any person has been adjudged guilty by a verdict of a jury, of any offence punishable by confinement in the State prison, such person can be admitted to bail only by the justice of the court who presided at the trial, or by some magistrate especially

¹R. S. ch. 82, sec. 37.

²Ib. sec. 38.

³Ib. sec. 39.

⁴Ib. sec. 41.

⁵R. S. ch. 132, sec. 41.

⁶Ib. sec. 47.

⁷Ib. sec. 49.

⁸Ib. sec. 60.

appointed by said justice, or either of the justices of the supreme judicial, or district courts, who may inquire into the case, and admit such person to bail.¹

Any two justices of the peace and quorum for any county, on application of any prisoner, committed for a bailable offence, with the exception just mentioned, or for not finding sureties to recognize for him, may inquire into the case, and admit such person to bail.²

Bailable offences are such as have not been denominated capital offences since the adoption of the constitution of this State.³

The justices, in such case, may issue a writ of habeas corpus, and cause the person proposing to give bail, to be brought before them for the above purpose.⁴

The form of a writ of habeas corpus issued by justices may be as follows :

"STATE OF MAINE.

[I. S.] C.—, ss. To A. B. of — :

Greeting :

[I. S.] We command you, that the body of C. D., in our prison, at —, under your custody, [or by you imprisoned and restrained of his liberty, as the case may be] as it is said, together with the day and cause of his taking and detaining, by whatsoever name the said C. D. shall be called or charged, you have before us, two justices of the peace and quorum for said county, at —, in our said county, immediately after the receipt of this writ, to do and receive what we shall then and there consider concerning him in this behalf. Witness our hands and seals, this — day of —, 185—.

_____, } Justices of the peace
_____, } and quorum."

Any person committed for not finding sureties, or refusing to recognize, as required by the court or magistrate, may be discharged by any judge or justice of the peace, on giving such security as was required,⁵ subject to the provisions of the statute of 1850, before quoted.

In all cases of recognizance or bail, full memoranda should be made in the docket. And if the condition be for an appearance at a higher court, the original recognizance, properly attested, with the fees certified thereon, should be sent up to that court and a copy transcribed into the records of the magistrate.

¹Acts of 1850, ch. 152.

²R. S. ch. 171, sec. 22.

³Const., amendments, Art. ii.

⁴R. S. ch. 140, sec. 25.

⁵R. S. ch. 169 sec. 12.

PART II.

OF JUSTICES IN CRIMINAL MATTERS—THEIR POWER AND PROCEEDINGS.

CHAPTER I.

THEIR JURISDICTION AND AUTHORITY.

THE local magistracy was originally established for the conservation of the public safety and tranquility, and its criminal jurisdiction has consequently always been very comprehensive. The civil power was conferred on it subsequently.

Justices of the peace have power to cause all laws, made for the preservation of the public peace, to be kept, and in the execution of that power, may require persons to give security to keep the peace, or for their good behavior, or both.

The justices shall cause to be arrested on proper complaint, all persons found within their counties charged with any offences, and all persons who, after committing any offence within the county, shall escape out of the same. They shall also examine into all treasons, felonies, high crimes, and misdemeanors, and commit or bind over, for trial, all persons who appear to be guilty thereof. They may also try all offences within their jurisdiction, committed within their respective counties, and sentence all persons convicted thereof, according to law, notwithstanding there may be a penalty accruing, in whole or in part, to their own town.¹

Justices of the peace, as conservators of the peace, may, on view, without any warrant in writing, command the assistance of any sheriff, deputy sheriff, constable, and of all other persons present, for the purpose of suppressing any affray, riot, assault or battery, within their county, and arrest all who are concerned therein.²

¹R. S. ch. 170, secs. 6, 7.

²Ib. sec. 1.

Every justice of the peace, within his county, may punish by fine, not exceeding ten dollars, all assaults and batteries and other breaches of the peace declared criminal by any statute or town by-law, when the offence is not of a high or aggravated nature, and cause to be stayed and arrested all affrayers, rioters, disturbers, and breakers of the peace, and all who go armed offensively, to the terror of the people, and such as utter threatening speeches, or are otherwise disorderly and dangerous.¹

When the offence is of a high and aggravated nature, the persons charged may be committed or bound over for trial to the court, by law having jurisdiction of the case.²

Any justice may issue summonses for witnesses to appear before any judicial court or before himself, or any other justice, in any criminal case; but not on the part of the State, except to appear before himself, without the consent of the attorney general or county attorney.³

He may issue warrants to search houses or places for property stolen, embezzled, or obtained by false tokens or pretences, or for counterfeit coins, bank bills, or other writings, or for any tools, machines, or materials used for the above purpose, or for dead bodies unlawfully disinterred, carried away, and concealed, or for persons, when such search is authorized by law.⁴ Also for intoxicating liquor.⁵

The criminal jurisdiction of justices is divisible into two classes :

1. Those cases in which they have *final* jurisdiction ;
2. Those which are only *commenced* by them, and must be passed up for trial to a superior court.

The justice has equal authority to act in both classes. In the first his power extends to conviction, sentence and punishment. In the second he has no power, when satisfied of the guilt of the accused, to punish, or make a final disposition of the matter ; but can only bind over, or commit to prison, to await a trial at a higher tribunal.

I. FINAL JURISDICTION.

This is confined strictly to those cases enumerated by the statute.

¹R. S. ch. 170, sec. 2.

²Ib. sec. 5.

³Ib. sec. 11.

⁴Ib. sec. 13.

⁵Acts of 1850.

The rule of law is imperative that he cannot transcend the limits of the *written* authority.¹

Justices have complete and final jurisdiction in the following cases :

I. Issuing search warrants.²

II. Requiring sureties for keeping the peace.³

III. He may also have jurisdiction for the prosecution, trial, and sentencing to punishment, subject to the right of appeal, of any person charged with the following offences :

1. Drunkenness.⁴

2. Profanity.⁵

3. Violation of the statutes with regard to the Lord's day, and disturbance of public worship in certain cases.⁶

4. Gaming.⁷

5. Selling spirituous and intoxicating liquors unlawfully.⁸

6. Larceny, by stealing of the property of another any money, goods, or chattels, or any bank note, bond, promissory note, bill of exchange, or other bill, order, or certificate, or any book of accounts respecting money or other things, or any deed or writing, containing a conveyance of real estate, or any valuable contract in force, or any receipt, release or defeasance, or any writ, process or public record, or any instrument of writing whereby any demand, right, or obligation shall be created, increased, extinguished or diminished, if the property stolen shall not be alleged to exceed the value of ten dollars.⁹

7. Receiving stolen property, in all cases where the justice would have jurisdiction of the larceny.¹⁰

8. Malicious mischief and wilful trespasses, when the value of the property taken or carried away, or injury occasioned thereby, is not alleged to exceed ten dollars, except for maliciously killing or injuring horses or cattle, injuring dams, canals, machinery, ponds, fire engines, bridges, roads, booms, rafts, vessels and other things specified in the Revised Statutes, chapter 162, sections one to four.¹¹

9. Assaults and batteries and other breaches of the peace declared

¹4 Mass. 641—Davis's Just. 35—Thacher's Crim. Cas. 113, 114.

²R. S. ch. 170, sec. 13, 14, 15, 16.

³Ib. sec. 4.

⁴R. S. ch. 160, sec. 36—Ib. ch. 173, sec. 10.

⁵R. S. ch. 160, sec. 22.

⁶Ib. sec. 22—§1.

⁷R. S. ch. 85, sec. 8.

⁸Acts of 1851, ch. 1.

⁹R. S. ch. 156, sec. 15.

¹⁰Ib.

¹¹R. S. ch. 162, sec. 15:

criminal by any statute or town law, not of a high and aggravated nature.¹

10. In penal actions where express authority is given by the statute creating the offence, to prosecute for and recover the same in a suit before a justice of the peace, or when the amount or value of the fine or penalty sought to be recovered does not exceed twenty dollars, notwithstanding his town may be interested in the penalty.²

11. Any justice of the peace may commit to the house of correction, to be there kept and governed according to law, and to the rules and orders thereof, all rogues, vagabonds, and idle persons going about in any town or place in the county begging, or persons using any subtle craft, juggling, or unlawful games or plays, or, for the sake of emolument, feigning to have knowledge in physiognomy, palmistry, or, for the like purpose, pretending that they can tell destinies or fortunes, or discover where lost or stolen goods may be found; common pipers, fiddlers, runaways, common drunkards, common night walkers, pilferers; persons wanton or lascivious in speech or behaviour, common railers or brawlers, such as mispend what they earn, and do not provide for themselves or their families.³

When doubts arise as to jurisdiction in any of the preceding cases it may be determined by this rule: When the court has not the right to inflict the whole punishment for the offence which the statute prescribes, the cognizance belongs to another tribunal, because, where the punishment is left to the discretion of the court, it is the duty of the justice to exercise that discretion in every case, and to inflict the whole punishment whenever, in his judgment, the offence requires it.⁴

II. INITIAL JURISDICTION.

This term is very comprehensive. It embraces all crimes and misdemeanours, and all coming within the statute meaning of the word "offences."

In addition to statute offences, the initial jurisdiction extends over the shadowy ground between matters cognizable by the civil and criminal tribunals, and comprehends all offences accompanied with violence, known at common law, whether codified by statute or not.⁵

¹R. S. ch. 154, sec 35—ch. 170, sec. 2 ⁴Thatcher's Criminal Cases, 208.

²Ib. ch. 116, sec. 1.

³1 Mass. 59—2 Mass. 534—3 N. H. 203.

⁵Ib. ch. 178, sec. 9.

The following list contains the principal offences coming within the initial jurisdiction of justices. Most, if not all, will be found in the Revised Statutes, or in the laws of the United States :

1. Treason.
2. Murder and manslaughter.
3. Duelling.
4. Mayhem.
5. Rape.
6. Aggravated assaults, with intent to kill, rob, commit rape, &c.
7. Extortion.
8. Kidnapping.
9. Poisoning food.
10. Arson and other burnings.
11. Burglary and housebreaking.
12. Stealing.
13. Embezzlement.
14. Cheating, obtaining money under false pretences, and like offences.
15. Maiming and destroying cattle.
16. Malicious trespasses of an aggravated nature.
17. Forgery and counterfeiting.
18. Perjury and subornation of perjury.
19. Bribery and embracery.
20. Escapes.
21. Falsely assuming to be a magistrate.
22. Compounding offences.
23. Officers taking reward for omitting duty.
24. Administering unauthorized oaths.
25. Riots.
26. Adultery.
27. Polygamy.
28. Gross lewdness and fornication.
29. Concealment by mother of the death of a bastard child.
30. Keeping a house of ill fame.
31. Selling or exhibiting obscene prints.
32. Incest.
33. Sodomy.

34. Disturbing religious worship in certain cases.
35. Violations of sepulture.
36. Injuring tombs.
37. Cruelty to animals.
38. Selling corrupt food, liquors, or medicines.
39. Lotteries.
40. Conspiracy.
41. Violations of laws in regard to elections.
42. Maintenance.
43. Piracy, and other offences against the United States laws.
44. Abortion.
45. Abductions.
46. Theatrical exhibitions without license.
47. Violations of statutes as to fisheries.
48. Other misdemeanors and breaches of the peace.

It is often difficult for the justice to decide in cases of breaches of the peace, and of assault and battery, whether they are, or are not, within his final province. The intention, the degree of malice, the amount of violence, the effect upon the parties injured, and the other attendant circumstances, must be carefully considered.

Any justice before whom a prisoner is brought, may associate another magistrate with him in performing the duties before mentioned; but, no fees shall be allowed him.¹

III. HOW FAR ABRIDGED BY MUNICIPAL, POLICE, AND TOWN COURTS.

For the general powers of these courts, reference is made to chapter one, section four, of this volume. The courts therein mentioned, except where the judge is interested, exercise jurisdiction over all such matters and things, within the county, as justices of the peace may exercise.

The municipal courts of Portland, Bath, Augusta, Saco and Brunswick, have jurisdiction of simple larcenies, when the property stolen does not exceed twenty dollars in value; and exclusive jurisdiction of all offences against the by-laws of those cities and towns.²

The police court of Bangor has concurrent criminal jurisdiction

¹R. S. ch. 171, sec. 23.

²R. S. ch. 98, sec. 5, 21—Acts of 1849, ch. 224, sec. 11.

with justices of the peace, in all matters, where the *penalty is under* twenty dollars, within the county, and original and exclusive jurisdiction of all offences against the by-laws of the city.¹

The municipal court for the town of Rockland has exclusive jurisdiction over all offences committed within the limits of the town, by law cognizable by justices of the peace; and original jurisdiction, concurrent with the district court, over crimes, offences and misdemeanors committed in the town, which are punishable by fine not exceeding one hundred dollars, and by imprisonment in the county jail not exceeding three months.²

The police court of Gardiner has concurrent jurisdiction with justices of the peace in all criminal matters *under* twenty dollars, within the county of Kennebec, and original and exclusive jurisdiction of all violations of the by-laws of the city.³

The town courts in the county of Waldo have like jurisdiction in all criminal causes as justices of the peace. They may take cognizance of simple larcenies, when the value of the stolen property does not exceed twenty dollars, and have exclusive jurisdiction of all offences against the by-laws of their towns.

Justices of the peace in the above cities or towns, who shall exercise any criminal jurisdiction, except under the authority of the United States, or when the judge of the court is a party or interested, are liable to fine.

¹R. S. ch. 98, secs. 29, 32.

²Acts of 1849, ch. 281, sec. 11.

³Acts of 1850, ch. 166, sec. 2.

CHAPTER II.

OF THE COMPLAINT AND WARRANT.

I. COMPLAINT.

THE complaint is the application made to the justice, informing him of the crime committed, and requesting process. It is the foundation of all proceedings, is required by law, and, in practice, is generally reduced to technical form by the magistrate himself, from the rough story of the complaint. It should be made to a magistrate of the county where the offence is alleged to have been committed.

Accessories before and after the fact may be complained against, indicted, tried, and punished in the same county in which the principal felon may be tried.¹

Where the offence is begun in one county, and completed in another, jurisdiction attaches in the latter.²

Any offence committed on the boundary between any two counties, or within one hundred rods of the same, may be alleged in the indictment or complaint to have been committed, and may be prosecuted and punished, in either county.³

The complaint must be upon oath, and expressed with reasonable precision, directness and fullness, that the person complained of may be fully prepared to meet, and, if he can, to answer and repel it.⁴ Where the proceedings of the magistrate are final, he has the right to demand technical and formal accuracy; but where they are merely initial, the magistrate has no right to quash the complaint for informalities.⁵

Complaints should, as far as practicable, describe accurately, the person, the offence, and the place, the time, and the manner, in which

¹R. S. ch. 167, sec. 5.

²2 Russell on Crimes, 217-18.

³R. S. ch. 166, sec. 4.

⁴16 Pick. 213—1 Chitty's Criminal Law, 170.

⁵16 Pick. 213—1 Fair. 473.

it was committed. The mode of making these allegations will be shown in considering—1. The parties; 2. The offence.

1. *The parties.* The names of the parties should be stated accurately, with the residence, and proper description, and a misnomer is fatal. But *junior* is no part of the name.¹ If, however, the name of the person is unknown, or he refuse to state it, he may be described by marks and indications, such as dress, size, manners, scars, lameness, and the like; but it must be sufficiently clear to identify him. Describing a woman, charged with keeping a house of ill-fame, as “the wife of C. D.,” is a mere description of the person, and is not necessarily fatal.²

The place of residence should be stated as accurately as circumstances will allow, and the name of the party injured, if known.

2. *The offence.* The time and place of the *acts* that constitute the body of the wrong, should be set forth.

But although it is necessary to allege a certain time, where that time does not enter into the nature of the offence, it may be laid at any period before the filing of the complaint.³

In complaints for offences of mere omission, or nonfeasance, generally, time and place need not be alleged, unless it be an omission to do a particular act at a particular time or particular place—in which case, the time or place becomes a material part of the averment.

The facts, circumstances, and intent constituting the offence must be described with particularity and certainty.⁴

The object of the rule requiring particularity is threefold—*First*, to apprise the defendant of the precise nature of the charge made against him: *Secondly*, to enable the court to determine whether the facts constitute an offence, and render proper judgment thereon: And *thirdly*, that the judgment may be a bar to any future prosecution for the same offence.⁵

There are, however, classes of cases to which this rule does not apply. Whenever the crime consists of a series of acts, they need not be specially described, for it is not *each* or *all* of the acts themselves, but the practice or habit which produces the principal evil and constitutes the crime.

¹ 1 Pick. 383—15 Pick. 7, 9—10 Mass. 203, 205.

² 1 Met. 152.

³ 3 Pick. 29.

⁴ 4 Chitty's Cr. L. 227.

⁵ 13 Pick. 363.

Thus, it is sufficient to charge a person with being a *common barrator*, or *common scold*. And it is not necessary to set forth any particular acts of *barratry* or of *scolding*, for it is the general practice, and not the particular act, which constitutes the offence. So it is sufficient to charge a person generally with keeping a house of ill fame, a disorderly house, or a common gaming house.¹

The several acts may be indicted and punished separately, but the keeping the house is a distinct offence, and as such liable to punishment.

When an act is made penal, with certain exceptions and limitations embraced in the same clause of the statute, so as to be descriptive of the offence intended to be punished, it is necessary to state in the indictment that the act was done, and to negative those exceptions and qualifications, and that the precise statute offence cannot otherwise be described and specified.²

Because, if all the facts alleged in the complaint may be true, and yet the defendant be not guilty, the complaint is not sufficient.

But where the exception is only a graduation of punishment to different degrees of the same species of offence, and the complaint sets forth the character of the offence as to its aggravation with sufficient distinctness, and thus indicates the punishment to be awarded, the complaint is not objectionable on the ground that no criminal offence is charged. It is not like those cases where every averment contained in the indictment may be true, and yet the defendant be guilty of no legal offence.³

Thus, a complaint for a violation in Massachusetts of what was known as "the fifteen gallon law" of that State (1838, ch. 157,) must aver a sale of a "less quantity than fifteen gallons," and an averment that the defendant "did sell one pint" is not sufficient. Because, if fifteen gallons were sold, it would be true that one pint and many pints were sold.⁴

Averments of immaterial facts may be rejected as *surplusage*, and need not be proved at the trial, unless they contain matters of description.⁵

Surplusage is an averment not contradicting other averments in the complaint, not descriptive of the identity of the charge, or of any thing essential to it, and not tending to show that an offence was committed.⁶

¹ Davis's Prec. of Indictments, 140, 198. ⁴ 23 Pick. 280.

² 23 Pick. 279—20 Pick. 862—3—2 Pick. 189—1 Met. 263. ⁵ 1 Met. 260—20 Pick. 364—15 Maine 476.

³ 1 Met. 263—4. ⁶ 3 Stark. Ev. 1529.

In cases of larceny, the value of the articles taken should be set forth.¹

The *intent* should be alleged, and where an evil intent accompanying an act is necessary to constitute such act a crime, the intent must be not only alleged but proved. But where the act is in itself unlawful, the law infers an evil intent, and the allegation of such intent is merely matter of form.²

No indictment or complaint shall be quashed, nor judgment thereon be arrested or affected, by reason of the omission or misstatement of the title, occupation, estate, or degree of the defendant, or of the name of the city, town, or county of his residence; nor by reason of the omission of the word "feloniously," or of the words "force and arms," or of the words "against the peace," or the omission to charge any offence to have been committed, contrary to the form of the statute or statutes; provided, that such omission or misstatement do not tend to the prejudice of the defendant.³

When written instruments form part of the gist of the offence, they should be set out in full, introduced by words to this effect, "*of the tenor following*," or the like.

If two distinct charges be set forth in the same complaint, it will be fatal for duplicity.⁴

Where, however, two crimes are of the same nature and necessarily so connected that they *may*, and when both are committed *must* constitute but one legal offence, they should be included in one charge. Familiar examples of these are, *assault and battery* and *burglary*. An assault and battery is really but one crime. The latter includes the former. A person may be convicted of the former, and acquitted of the latter, but not *vice versa*. They must therefore be charged as one offence. So in burglary, where the indictment charges a breaking and entry with intent to steal, and an actual stealing, the jury may acquit of the burglary and convict of the larceny, but cannot convict of the *burglary* and *larceny* as two distinct offences. The latter is merged in the former, and they constitute but one offence.⁵

A charge of "an endeavor to seduce, entice, and stir up to commit mutiny," and "an endeavor to seduce, entice, and stir up to commit traitorous and mutinous practice," is not bad, because the endeavor,

¹ Met. 135.

² East, 464.

³ R. S. ch. 172, sec. 38.

⁴ 2 Mass. 168-4—6 Met. 247.

⁵ 20 Pick. 361.

though a conclusion from an infinite variety of facts and circumstances, is but a conclusion of fact, is itself a fact, admitting of no definition or description.

So if an indictment charge that the defendant did presume to be a common seller, &c., and did sell, &c., but one offence is charged.¹

There must be no material allegations repugnant to each other.

As to the joinder of several defendants in one complaint, the general rule seems to be that, "where the same evidence, as to the act which constitutes the crime, applies to two or more, they may be jointly indicted. Nor is it an objection that the fact proved against two or more, constitutes a distinct species of legal and technical offence. As where a wife, acting with a third person, maliciously takes the life of her husband. It is murder in the one, petit treason in the other; yet they may be indicted together. So where the same evidence proves one guilty as principal, and another as accessory before the fact, in felony, they may be jointly indicted."²

Where several defendants are so joined, they are not entitled of right to be tried separately, but they may be tried jointly or separately in the discretion of the court.³

It must follow, from what has been already said, that a warrant cannot be issued on a complaint setting forth that the complainant "*has probable cause to suspect*" that the defendant is guilty of a certain crime or offence, if the offence complained of is within the final jurisdiction of the magistrate, unless the statutes confer such authority by express language. But where the jurisdiction is only *initial*, the rule is otherwise, because suspicion being a good ground to warrant the magistrate to commit or hold to bail, it follows, that it is sufficient to constitute the substantive matter and principal averment in the complaint, upon which the warrant is granted.⁴ Neither does the rule apply to search warrants, for they must necessarily be based on suspicion.⁵

What disqualifies a witness, is a question of no minor importance. This point we have considered at some length in chapter viii, page 60, of this volume, and to that we refer. We may say here, however, that it is well settled that the justice may refuse to issue a warrant on

¹17 Maine, 154—9 Met. 569.

²2 Met. 191.

³16 Maine, 293.

⁴16 Pick. 215.

⁵Ib.

a complaint, where he has final jurisdiction, if he is satisfied that the charge is the result of malice and corruption.

Accessories. Offenders may be complained against as accessories before or after the fact. There can be accessories only to felonies. In misdemeanors, all parties concerned are principals.

The term "felony" in this connection, is construed to include murder, rape, arson, robbery, burglary, maims, larceny, and every offence punishable with death or by imprisonment in the State prison.¹

Every person who shall aid and abet in the commission of any felony, or who shall be accessory thereto before the fact, by counselling, hiring, or otherwise procuring the same to be committed, shall be punished in the same manner, which is or shall be prescribed for the punishment of the principal felon.²

Every person, who shall commit the above crime may be indicted and convicted as an accessory before the fact, either with the principal felon, or after his conviction, or he may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been convicted, or shall or shall not be amenable to justice; and shall, in the last mentioned case, be punished in the same manner, as if convicted of being an accessory before the fact.³

Every person not standing in the relation of husband or wife, parent or child, to the principal offender, who shall harbor, conceal, maintain, or assist any principal felon, or accessory, before the fact, to any felony, knowing him to be such, with intent that he shall avoid or escape from detection, arrest, trial, or punishment, shall be deemed an accessory after the fact, and shall be punished by imprisonment in the State Prison, not more than seven years, or in the county jail not more than one year, and by fine not exceeding one thousand dollars; but, in no case, shall such punishment exceed the punishment to which the principal felon on conviction would have been liable.⁴

Every person, who shall be accessory after the fact to any felony, may be indicted, tried and sentenced in any court or county, having jurisdiction of the principal offence, whether the principal felon shall or shall not have been convicted, or shall or shall not be amenable to justice.⁵

¹R. S. ch. 167, sec. 2.

²Ib. sec. 3.

³Ib. sec. 4.

⁴Ib. sec. 6.

⁵R. S. ch. 167, sec. 7.

In cases against accessories, either before or after the fact, if the principal felony be committed in one county, and the offence of being accessory thereto be committed in another, the last mentioned offence may be indicted, tried, and punished in either of said counties.¹

No person shall be prosecuted for any offence, except treason, murder, arson or manslaughter, unless the indictment shall be found within six years after the offence shall have been committed; provided, that the offender shall not flee from justice, and that no other limitation for the prosecution of such offender is limited by law; but any period, during which the party charged was not usually and publicly resident within this State, shall not be reckoned as a part of the six years.²

No person shall be indicted and convicted of treason or misprision of treason, unless the indictment shall be found within three years next after the commission of the treason.³

Prosecutions for malicious trespass, mentioned after the fourth section of chapter 162, of the Revised Statutes, must be commenced within four years from the time the offence was committed.⁴

II. OF THE WARRANT.

When the complaint is made to the justice, if it shall appear to him, from the examination of the complainant and other witnesses, that the offence alleged has been committed, and that there is reason for believing the person charged to be guilty, he shall issue a warrant, stating the substance of the charge, and requiring the officer, to whom it is directed, forthwith to arrest the person accused, and bring him before such justice, or some other magistrate of the county, to be dealt with according to law; and in the same warrant, may require the officer to summon such witnesses as shall be therein named, to appear and give evidence on the examination.⁵

We have previously stated that justices have the power, under the statute, without a warrant, to order the arrest of persons engaged in any affray, riot, assault or battery actually committed within his presence or view, and within his county. This authority arises from the necessity of the case; but there should be no final commitment, until a formal complaint be made and a warrant issued.

¹R. S. ch. 167, secs. 5, 7.

²Ib. sec. 15.

³R. S. ch. 153, sec. 5.

⁴R. S. ch. 162, sec. 14.

⁵R. S. ch. 171, sec. 2—Ib. ch. 170, sec. 3.

Warrants are of two kinds ;—those issued to arrest an offender on a charge of a direct offence, and search warrants, which are more in the nature of a proceeding *in rem*—that is—for the discovery of *property*. The requisites of both are in many respects the same, and we shall first consider the general requisites of all warrants, and then what is peculiar to search warrants.

All warrants should issue in the name of the State. The county should also be mentioned, that it may appear on the face of the proceedings that the court has jurisdiction.

They should be directed to all officers competent to serve them, that, in failure of any particular officer, there may be no failure of justice. But in no case should one be directed to private individuals, as they have no authority to serve it.¹

The officers are, the sheriff of the county, or his deputies, or any constable of any town within said county.

It should also be under the hand and seal of the magistrate, and dated the day it issues.

It should describe the party to be apprehended, and in this should follow the complaint.

In the allegation of the crime, the statute requires that it should recite the substance of the accusation ; and for this purpose it is better for an inexperienced magistrate to recite the allegations in the complaint *verbatim*, varying of course the time and tenses. It should also, we think, set forth an adjudication on the complaint, that it appears to the magistrate that the crime has been committed. In this state it is customary to append the warrant to the complaint, referring to that for the particulars of the offence charged. The legality of this mode has been settled both in this State and Massachusetts.²

In all cases where the magistrate is called upon to issue warrants, he should as in civil cases, make a memorandum of the fact, and of all subsequent proceedings in the case, in a docket kept for that purpose.

Search warrant. This is a warrant, directing the officer to search a certain place or places specified in the warrant, for certain goods or articles, which there is cause to believe are therein concealed ; and, in practice, is often the foundation for future criminal proceedings against the party suspected of the concealment.

¹ Mass. 488.

² 25 Maine, 490—8 Met. 327—8—2 Met. 329.

The constitution of Maine provides that the people shall be secure in their persons, houses, papers and possessions from all unreasonable searches and seizures ; and that no warrant to search any place, or seize any person or thing, shall issue without a special designation of the place to be searched, and the person or thing to be seized, nor without probable cause, supported by oath or affirmation.¹

The statutes are in conformity with this provision of the constitution.²

The power of the magistrate to issue search warrants is strictly confined to the cases in which the authority is delegated by statute.

Justices may, within the limits of their jurisdiction, issue warrants to search any house or place, for personal property stolen, embezzled, or obtained by false tokens or pretences, or for forged and counterfeit coins, bank bills, or other writings, or for any machines, or materials, used or designed for making the same, or for any dead body, unlawfully disinterred, carried away and concealed.³ They may also issue search warrants for any female who has been enticed to a house of ill-fame; for obscene books, pamphlets, prints, pictures or other things; for gambling implements;⁴ for intoxicating liquors;⁵ and for gunpowder.⁶

All search warrants should be directed to the sheriff of the county, or his deputy, or to any of the constables of a town, or to any other person by name, commanding such officer to search the house or place where stolen property, or other things, for which he is required to search, are believed to be concealed; which place and property, or things to be searched for, shall be designated and described in the warrant; and to bring such stolen property, or other things, when found, and the persons, in whose possession the same shall be found, before the magistrate who issued the warrant, or before some other magistrate or court, having cognizance of the case.⁷

Such warrant shall not authorize the person executing it to search any dwelling house in the night time, unless the justice shall be satisfied that it is necessary in order to prevent the escape or removal of the person or property to be searched for, and unless such authority shall be distinctly expressed and given in the warrant.⁸

¹Const., Art. 1, sec. 5.

²R. S. ch. 170, sec. 14.

³R. S. ch. 170, sec. 13.

⁴R. S. ch. 160, secs. 18, 20, [39.

⁵Acts of 1850,

⁶R. S. ch. 34, sec. 5.

⁷R. S. ch. 170, sec. 15.

⁸Ib. sec. 16.

When any officer, in the execution of a search warrant, shall find any stolen or embezzled property, or shall seize any of the other things, for which a search is allowed by the provisions of this chapter, all the property and things so seized shall be safely kept, by the direction of the court or magistrate, so long as shall be necessary, for the purpose of being produced or used as evidence on any trial ; and as soon as may be afterwards, all such stolen and embezzled property shall be restored to the owner thereof, and all the other things, seized by virtue of such warrant, shall be burnt or otherwise destroyed, under the direction of the court or magistrate.

If any person shall make oath before any justice of the peace that he has probable cause to suspect, and does suspect, that any house or building is unlawfully used as a common gaming house, for the purpose of gaming for money or other property, and that idle or dissolute persons resort to the same for that purpose, whether they be known to the complainant or not, such justice shall issue his warrant for the search of the gambling implements there used ; and if found there, or any of them, for the apprehension also of the keeper of such house or building.¹

Every custom house officer, who shall have cause to suspect a concealment of any goods, subject to duties, in any particular dwelling house, building, or other place, shall, upon application to a justice of the peace, be entitled to a warrant, to enter such house or place in the day time only, to search for such goods, and if such shall be found, to seize and secure the same for trial.²

If any three persons, voters in the town or city where the complaint shall be made, shall before any justice of the peace or judge of a municipal or police court, make complaint under oath or affirmation, that they have reason to believe, and do believe, that spirituous or intoxicating liquors are kept or deposited, and intended for sale, by any person not authorized to sell the same, in said city or town, under the provisions of the act of 1850, in any store, shop, warehouse or other building or shall in said city or town, said justice or judge shall issue his warrant of search to any sheriff, city marshal or deputy, or to any constable, who shall proceed to search the premises described in said warrant, and if

¹R. S. ch. 160, sec. 39.

²U. S. Laws, 1799.

any spirituous or intoxicating liquors are found therein, he shall seize the same, and convey them to some proper place of security, where he shall keep them until final action is had thereon. But no dwelling house in which, or in part of which, a shop is not kept, shall be searched, unless at least one of said complainants shall testify to some act of sale of intoxicating liquors therein, by the occupant thereof, or by his consent or permission, within at least one month of the time of making said complaint.¹

The statutes require, as before stated, as exact descriptions of the place to be searched and the property to be seized, as the nature of the case will permit. Thus under a warrant to search the house of *Thomas Sanford*, the house of *Thomas Sanford and Company* cannot be searched.²

So of the property, a general description, as "goods, wares, and merchandize," without any specification of their character, quality, number or weight, or any other circumstance tending to distinguish them, cannot be such a particular description as the constitution and statutes require.³

But in the same case the court further say, that in the case of smuggled goods it may be difficult to describe them with minuteness; *nor could this be required*. But it would not be difficult to mention the kind of goods to be searched for, or at least to describe them as having been taken out of some certain vessel; so that the officer who should undertake such a search might not conceive himself at liberty to rifle the house, and disturb the arrangements of the family occupying it.⁴

Of requiring sureties for keeping the peace. Justices of the peace have power to cause all laws made for the preservation of the public peace, to be kept; and in the execution of that power, they may require persons to give security to keep the peace, or for their good behavior, or both.⁵

Any justice of the peace, on complaint made to him that any person has threatened to commit an offence against the person or property of another, shall examine the complainant on oath, and also any witnesses

¹Acts of 1850, ch. 1, sec. 11.

²13 Mass., 289.

³Ib.

⁴13 Mass. 289.

⁵R. S. ch. 169, sec. 2.

who are produced, and reduce the complaint to writing, and cause the complainant to subscribe the same.¹

If there should appear to the justice on such examination that there is just cause to apprehend and fear the commission of such offence, he shall issue a warrant under his hand and seal, containing a recital of the substance of the complaint, and commanding the officer, to whom the same may be directed, forthwith to arrest the person complained of, and bring him before such magistrate or court having jurisdiction of the cause.²

When the person complained of is brought before the magistrate, he may be required, after his defence has been heard, to enter into a recognizance with sufficient sureties, in such sum as shall be ordered, to keep the peace towards all the people of the State, and especially towards the person requiring the security, for such term as the magistrate may order, not exceeding one year, but shall not be bound over to any court unless he is also charged with some specific and other offence, for which he ought to be held to answer at such court.³

If the person complained of shall comply with the order of the justice, he shall be discharged.⁴

If the person shall refuse or neglect to recognize, the justice shall commit him to the county jail during the period for which he was required to find sureties, or till he shall so recognize; and the justice shall state in the warrant the cause of commitment, and also the time and sum for which security was required. He shall also return a copy of the warrant to the district court, next to be holden in the same county, and such court shall have cognizance of the case in the same manner, as if the party accused had appealed to said court.⁵

When the justice, on examination, shall not be satisfied that there is just cause to fear the commission of any such offence, he shall immediately discharge the party complained of; and if he shall judge the complaint unfounded, malicious, or frivolous, he may order the complainant to pay the costs of prosecution, who shall thereupon be answerable to the justice and officer for their fees, as for his own debt.⁶

When the person complained of is required to give security for the peace, or for his good behavior, the justice may further order that

¹R. S. ch. 169, sec. 3.

²Ib. sec. 4.

³Ib. sec. 5.

⁴Ib. sec. 6.

⁵Ib. sec. 7.

⁶Ib. sec. 8.

the costs of prosecution, or any part thereof, shall be paid by such person, who shall stand committed until such costs are paid, or he is otherwise discharged.¹

Any person aggrieved by the order of such justice of the peace, in requiring him to recognize as aforesaid, may, on giving the security required, appeal to the next district court in the same county.²

When an appeal is taken, the justice shall require such witnesses, as he may think necessary, to recognize for their appearance at the court appealed to.³

If the appellant shall fail to prosecute his appeal, his recognizance shall remain in full force, as to any breach of the condition, without an affirmation of the judgment or order, and stand as a security for any costs which may be ordered by the court to be paid by the appellant.⁴

Any person committed for not finding sureties, or refusing to recognize, as required by the justice, may be discharged by any judge or justice of the peace, by giving such security as was required.⁵

Every recognizance, taken pursuant to the foregoing provisions, shall be transmitted to the district court on or before the first day of the next ensuing term, and shall there be filed by the clerk, as of record.⁶

Whoever, in the presence of any justice shall make any affray, or threaten to kill or beat another, or commit any violence against his person or property, or shall contend, with hot and angry words, to the disturbance of the peace, may be ordered, without process or any other proof, to recognize for keeping the peace, or being of good behavior, for a term not exceeding three months, and, in case of refusal, may be committed to prison as before directed.⁷

Any person, going armed with any dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault on himself or any of his family or property, may, on the complaint of any person having cause to fear an injury or breach of the peace, be required to find sureties for keeping the peace for a term not exceeding one year, with the right of appeal as before provided.⁸

¹R. S. ch. 169, sec. 9.

²Ib. sec. 10.

³Ib. sec. 11.

⁴Ib. sec. 12.

⁵Ib. sec. 13.

⁶Ib. sec. 14.

⁷Ib. sec. 15.

⁸Ib. sec. 16.

In a suit on such recognizance, if a forfeiture is found or confessed, the justice, on petition, may remit the penalty, or such part of it as he may think proper, on such terms as he may think right.¹

Any surety in a recognizance may surrender the principal, in the same manner as if he had been bail for him in a civil cause, and on such surrender shall be discharged from all liability for any act of the principal after such surrender, which would be a breach of the recognizances; and, upon such surrender, the principal may recognize anew with sufficient surety or sureties for the residue of the term, before any justice of the peace, and shall thereupon be discharged.²

Of persons demanded by other States. Whenever any person shall be found within this State, charged with any offence committed in any other State or territory, and liable, by the constitution and laws of the United States, to be delivered over upon the demand of the executive of such other State or territory, any justice authorized to issue warrants in criminal cases, may, upon complaint under oath, setting forth the offence and such other matters as are necessary to bring the case within the provisions of law, issue a warrant to bring the person so charged before the same or any other court or magistrate within the State, to answer to such complaint, as in other cases.³

If on the examination of the person charged, it shall appear to the court or magistrate that there is reasonable cause to believe that the complaint is true, and that such person may be lawfully demanded of the executive, he shall, if charged with an offence bailable by the laws of this State, be required to recognize, with sufficient sureties, to appear before such court or magistrate at a future day, allowing a reasonable time to obtain the warrant of the executive, and to abide the order of the court or magistrate; and if such person shall not so recognize, he shall be committed to prison, and be there detained until such day, in like manner as if the offence charged had been committed within this State; and if the person so recognizing shall fail to appear, according to the condition of his recognizance, he shall be defaulted, and the like proceedings shall be had, as in the case of other recognizances entered into before such court or magistrate; but if such person shall be charged with an offence not bailable by the laws of this State, he shall be

¹R. S. ch. 169, sec. 17.

²Acts of 1846, ch. 198, sec. 1.

³Ib. sec. 18.

committed to prison, and there detained until the day so appointed for his appearance before the court or magistrate.¹

If the person, so recognized or committed, shall appear before the court or magistrate, upon the day ordered, he shall be discharged, unless he shall be demanded by some person authorized by the warrant of the executive to receive him, or unless the court or magistrate shall see cause to commit him, or to require him to recognize anew, for his appearance at some other day; and if, when ordered, he shall not so recognize, he shall be committed and detained as before; provided, that whether the person so charged shall be recognized, committed or discharged, any person, authorized by the warrant of the executive, may at all times take him into custody, and the same shall be a discharge of the recognizance, if any, and shall not be deemed an escape.²

The complainant, in such case, shall be answerable for all the actual costs and charges, and for the support in prison of any person so committed, to be paid in the same manner as by a creditor for his debtor committed on execution; and if the charge for his support in prison shall not be so paid, the jailer may discharge such person, in like manner as if he had been committed on an execution.³

Of the power to dismiss proceedings. When criminal process has been instituted to bring an offender to justice, public policy generally requires that it should not be terminated by any understanding between the complainant and the accused, but that it should be pursued until withdrawn by the proper authority, representing the State. But where the process, though in form in the name and behalf of the State, is yet in fact and effect a civil preventive remedy, designed for the protection of an individual, when the necessity for the remedy has ceased, and the complainant no longer desires the protective shield, the magistrate may, and indeed should, all parties consenting, take no further cognizance of the matter.⁴

A complaint that the defendant has threatened to commit an offence against the person or property of another, and a warrant thereon, is a proceeding of this nature.

If in such a process, before the magistrate has adjudged sureties of the peace to be necessary, or has required them at the hands of the

¹ Acts of 1846, ch. 193, sec. 2.

² *Ib.* sec. 3.

³ *Ib.* sec. 4.

⁴ 1 Fair. R., 332.

accused, he has succeeded in quieting and allaying the apprehensions of the complainant, and, friendly relations being established between them, the complainant intimates his wish to withdraw the process afforded for his benefit, and the magistrate permits it, the court say, they are not aware that the dignity, honor, or policy of the law is impaired by such a course. The process has done its office. The benign purpose of the law has been answered. And in accordance with this view of the subject, the prosecuting officer of the government never does, in practice, press the accused further, when advised that the complainant is satisfied.¹

Any person committed or recognized to answer to a charge of assault and battery, or other misdemeanor, for which the party injured may have a remedy by civil action, except where the offence was committed by or upon a sheriff, or other officer of justice, or riotously, or with a felonious intent, if the party injured shall appear before the magistrate, who made the commitment or took the recognizance, and acknowledge in writing that he has received satisfaction for the injury, the magistrate, in his discretion, may, on payment of all costs, discharge the recognizance, or supersede the commitment, by an order under his hand ; and may also discharge the recognizances of all the witnesses taken in the case.²

¹1 Fair, 332.

²R. S. ch. 171, sec. 25.

CHAPTER III.

OF THE SERVICE AND RETURN OF THE WARRANT.

I. OF THE SERVICE.

EVERY warrant properly contains two precepts. The first requires the officer forthwith to arrest the party complained against, and the second requires him to summon the complainant and such other witnesses as may be, to appear and give evidence before the justice who issued the warrant, or before some other court or magistrate.

By "arrest" is to be understood, to take the party into custody. It is so used in works of authority. An arrest is the beginning of imprisonment, when a man is first taken and restrained of his liberty by power or color of lawful warrant.¹

It is said that no manual touching of the body, or actual force, is necessary to constitute an arrest. It is sufficient if the party be within the power of the officer, and submit to the arrest.²

But if he be not taken into actual custody, it will not amount to arrest; for mere words will not, in this respect, be of any avail.³

And it is better that the person making the arrest should in all cases touch the body, as that has, in some States, been held to be necessary.⁴

The exemptions which exist in civil cases here cease to operate. Thus a married woman, when she has committed an offence for which she is subject to punishment, is liable to be apprehended.⁵

We shall speak first

OF ARRESTS WITHOUT WARRANTS.

These may be made by the magistrate himself; by officers qualified to serve warrants, such as sheriffs, deputy sheriffs, and constables; by

¹ 1 Met. 504.

² 2 N. H., 318.

³ Met. and Per. Dig. 234, and cases cited. ⁴ 1 Ch. Cr. L., 12.

⁵ 1 Chitty, 39.

other officers, who act as conservators of the peace, viz., coroners and watchmen; or by private persons; the respective rights and liabilities of the parties varying in each instance. The power of a magistrate, as such, to arrest without warrant, is confined to cases of violence, committed within his actual presence.¹

The rule of law is strict that no person can, in general, be taken into custody, without warrant, for a mere misdemeanor unattended with violence, as perjury or libel.²

And no private person can arrest without warrant for a mere breach of the peace, after it is over.³

1. *Arrest by private persons.* Where a felony has been *actually* committed, a private person, acting with a good intention, and upon information that amounts to a *reasonable and probable ground for suspicion*, is justified in apprehending without a warrant the suspected person, in order to carry him before a magistrate.⁴

But such an arrest, made upon a suspicion which afterwards appears to be *unfounded*, is good cause for an action for false imprisonment, although a felony had been actually committed.⁵

Evidence, in such suit, of a reasonable suspicion of the plaintiff having been guilty of felony, is admissible in reduction of damages.

This law has been denied in some of the State courts in this country; and it has there been held that if an innocent person has been arrested on suspicion by a private individual, such individual is excused if a felony was in fact committed, and there was reasonable ground to suspect the person arrested.⁶

The following have been said to be sufficient causes for suspicion:

First—Common reputation. But it seems that it ought to appear upon evidence, in an action brought for such arrest, that such fame had some probable ground.

Second—Living a vagrant, idle, and disorderly life, without having any visible means to support it.

Third—Being in company with one known to be an offender, at the time of the offence; or generally at other times keeping company with persons of scandalous reputations.

¹R. S. ch. 170, sec. 1.

²Ch. Cr. Law, 15.

³2 N. H., 318.

⁴4 Bl. Com., 293, n. 16.

⁵Ib.—1 Doug. 59.

⁶2 Wend. 350—6 Bing., 316.

Fourth—Being found in such circumstances as induce a strong presumption of guilt ; as coming out of a house wherein murder has been committed, with a bloody knife in one's hand ; or being found in possession of any part of goods stolen, without being able to give a probable account of coming honestly by them.

Fifth—Behaving one's self in such manner as betrays a consciousness of guilt ; as where a man being charged with treason or felony says nothing to it, but seems tacitly by his silence to own himself guilty ; or where a man accused of any such crime, upon hearing that a warrant is taken out against him, absconds.

This suspicion must exist in the breast of the person arresting ; and no causes of suspicion whatsoever, let the number and probability of them be ever so great, will justify the arrest of an innocent man, by one who is not himself induced by them to suspect him to be guilty.

A private person, who has apprehended another for treason or felony, may deliver the prisoner into the hands of an officer, or he may carry him to any jail in the county ; but the safer course seems to be, to cause him, as soon as convenient, to be brought before some justice of the peace, by whom the prisoner may be examined and bailed or committed to prison. Where a private person has apprehended another, assisting in an affray, he may lawfully detain him till the heat is over, and then deliver him to the officer. If a man be found attempting to commit a felony in the night, any one may apprehend him, and detain him until he be carried before a magistrate.¹

2. *Arrests by officers.* If a private individual has this power to arrest offenders without warrant, of course it lies in an officer. And the chief difference between his power and duty and that of a private person, seems to be that he has greater authority to demand the assistance of others, and is liable to a severer penalty for any neglect of duty, and that he ought to bring the party suspected before a justice of the peace, in order to be examined.²

Another difference seems to be that a private person cannot, of his own accord, arrest a person, except upon his own suspicion, and not upon report, or the suspicion of another, whereas an officer may, if a felony has been committed by some one, lawfully apprehend a supposed offender on the information of others, without any positive charge, or

¹Chitty's *Crim. Law*, 15.

²1 N. H. 53.

his own knowledge of the circumstances on which the suspicion is founded. And an officer may justify an imprisonment, without warrant, on a reasonable charge of felony made to him, although he afterwards discharges a prisoner without taking him before a magistrate, and although it turn out that no felony was committed by any one.¹

It is the duty of every sheriff, deputy sheriff, constable, city marshal and his deputies, watchmen, and police officer, to arrest and detain, until a legal warrant for his apprehension can be obtained, every person found violating any law of the State, or any legal ordinance or by-law of their city or town.²

If any officer, in the exercise of this power, shall act wantonly, or oppressively, or shall detain any offender, without warrant, longer than such time as may be reasonably necessary to procure a legal warrant, such officer shall be liable to pay all such damages as the person detained shall suffer thereby.³

Whenever it shall be the duty of any officer to make oath to any complaint before any magistrate, it shall be sufficient for him to swear that the facts set forth in the complaint are true according to his knowledge and behalf.⁴

3. *Arrests by magistrates.* The right of a magistrate to arrest without warrant has already been partially considered. He has a double power in relation to the arrest of felons ; one upon complaint of other persons, the other primitive and original in himself. He may command any person verbally to arrest a felon, and such command is said to be a good warrant without writing ; but if the felony or other breach of the peace be done in his absence, then he must issue his warrant in due course of law to apprehend the malefactor.

But this power is to be exercised only for the purpose of arrest, to prevent the prisoner escaping beyond the reach of his authority ; and when this danger is over, a regular complaint should be instituted as the foundation of legal process.

If any persons, to the number of twelve or more, any of them being armed with clubs or other dangerous weapons, or if any persons, to the number of thirty or more, whether armed or not, shall be unlawfully, riotously, or tumultuously assembled in any city or town, it shall be the

¹ Ch. Cr. L. 20, 21.

² Acts of 1848, sec. 1.

³ Ib. sec. 2.

⁴ Ib. sec. 3.

duty of the mayor and of each of the aldermen of such city, and of each of the selectmen and constables of such town, and every justice of the peace living in such town, and also of the sheriff of the county and his deputies, to go among the persons so assembled, or as near to them as may be with safety, and, in the name of the State, to command all persons, so assembled, immediately and peaceably to disperse; and if the persons so assembled, shall not thereupon immediately and peaceably disperse, it shall be the duty of each of said magistrates and officers to command the assistance of all persons then present, in arresting and securing in custody the persons so unlawfully assembled, so that they may be proceeded with, according to law.¹

If any person shall refuse to assist in arresting the persons so unlawfully assembled, or shall refuse immediately to disperse upon being commanded so to do, as mentioned in the preceding section, he shall be deemed one of such unlawful or riotous assembly, and shall be punished by fine and imprisonment.²

If any such magistrate or other officer, having notice of any such unlawful or tumultuous assembly, in the city or town where he dwells, shall refuse or neglect immediately to execute his duty in relation thereto, he shall be punished by a fine, not exceeding three hundred dollars.³

If any persons, so riotously or unlawfully assembled, shall, upon command as aforesaid, refuse or neglect to disperse without unnecessary delay, any two of the magistrates or officers before mentioned, may require the aid of a sufficient number of persons, in arms or otherwise, and shall proceed in such manner as they may judge expedient, to suppress such riotous or tumultuous assembly, and to arrest and secure the persons composing the same, that they may be proceeded with according to law.⁴

When an armed force shall be called out, as provided in the preceding section, they shall obey such orders for suppressing such unlawful and riotous assembly, and for arresting and dispersing the persons engaged therein, as they may receive from the governor, or any judge of a court of record, or the sheriff of the county, or from any two of

¹R. S. ch. 159, sec. 5.

²Ib. sec. 6.

³Ib. sec. 7.

⁴Ib. sec. 8.

the magistrates or officers mentioned in the fifth section of chapter 159, of the Revised Statutes.¹

If, by reason of any efforts made, as before mentioned, to suppress such riotous and unlawful assembly, or arrest and secure the persons composing the same, who have refused to disperse, though the number remaining be less than twelve, any such persons, or any persons present as spectators or otherwise, shall be killed or wounded, the said magistrates and officers and all persons acting with them by the order or direction of the governor, or any judge, sheriff, magistrates or officers, shall be held guiltless and justified in law; and if any of said magistrates or officers, or persons acting by such order or direction, shall be killed or wounded, all persons, so unlawfully or riotously assembled, and all other persons who, when commanded or required, shall have refused to aid and assist the said magistrates or officers, shall be held answerable therefor.²

All courts of record have authority to order the commitment of any person present in court, charged with crime, or any one guilty of a contempt of court. The sheriff or other officer is obliged to obey the order without writing, as the prisoner knows for what offence he is committed. If the officer is called upon to justify the imprisonment, he may obtain from the clerk a copy of the record.³

Justices of the peace have no power to commit for contempt, unless given by statute. In Maine no such power is given, but it is presumed that any wilful disturbance of their courts, which prevents the progress of a trial, would be a sufficient breach of the peace to authorize the arrest and punishment of the offender or offenders.

When any witness shall refuse to recognize, with or without sureties, as required for his appearance before the justice or a higher court, he may be committed to prison to remain till by law discharged.⁴

3. *What protection the person making arrests without warrant may have in acts of violence.* We have already seen that where persons forming riotous and tumultuous assemblies refuse to disperse, the magistrate and officers, and other persons acting under their orders, shall be held guiltless and fully justified in law for the results of their legal action.

¹R. S. ch. 159, sec. 9.

²Ib. sec. 10.

³2 Mass. 558.

⁴R. S. ch. 171, sec. 20.

How far a private individual would be justified in acts of actual violence in the apprehension of a felon, or one guilty of breaking the peace, there may be some doubt. If he has the right to arrest, he certainly ought to have the right to use sufficient force for that purpose, as otherwise his power would amount to nothing at all.

An officer undoubtedly may use any force necessary for making the arrest; and it is said that killing an officer will be murder, though he has no warrant, and was not present when the felony was committed, but takes the party on a charge only; and though that charge does not, in terms, specify all the particulars necessary to constitute a felony.¹

It is a much more delicate matter to determine when doors may be broken to arrest a felon, without warrant.

It is a familiar boast of the common law that every man's house is his castle; and, in accordance with the principle of this maxim, no officer can justify a forcible entry to a house for the purpose of executing civil process. But this protection fails a presumed offender as against a criminal process.

There appears to be a difference here also between the right of a private person, and the right of an officer, to break doors. Where a felony is committed in the view of a private person, he may justify breaking open doors upon following the felon, and if he kill him, provided he could not otherwise take him, the act is justifiable; and if he be killed in endeavoring to make such arrest, it is murder in the parties resisting. But he cannot justify breaking open doors to apprehend another on probable suspicion of felony, and if he do, and either party be killed in the attempt, it is manslaughter, and no more.²

But an officer has more extended power. He may not only break open a door to take a felon, but, where a felony has been committed, and he has reasonable cause to suspect that any one be the offender, he may break down doors to apprehend him. And, further, doors also may be broken down by an officer where a felony has not yet been committed, but likely to be so, in order to prevent it.³

Upon the whole, it seems to be the better opinion that a private person, in order to justify breaking open doors without a warrant, must in general prove the actual guilt of the party arrested; and that

¹Chitty's Crim. Law, 22.

²Ib. 17.

³Ib. 23.

it will not suffice to show that a felony has been actually committed by another person, or that reasonable ground of suspicion existed; but that an officer, acting *bona fide* on the positive charge of another, will be excused, and the party making the accusation will alone be liable. But the breaking an outer door is, in general, so violent, obnoxious and dangerous a proceeding, that it should be adopted only in extreme cases, where an immediate arrest is necessary.¹

And it is doubtful whether admittance should not be first demanded in all cases. It certainly should in the case of a misdemeanor.²

It is proper, though hardly necessary, to observe, that all the privileges attendant on private dwellings, relate to arrests *before indictment*; for there is no question whatever that, after indictment found, a criminal of any degree may be arrested in any place, and that no house is a sanctuary for him.

OF ARRESTS UNDER WARRANTS.

Before entering upon this subject it may be proper to observe that when the officer is once entrusted with the precept, he should proceed immediately to execute it. The provisions of law in this respect are stringent.

If any officer, authorized to serve process, shall wilfully and corruptly refuse to execute any lawful process to him directed, requiring him to apprehend or confine any person charged with or convicted of an offence, or shall wilfully and corruptly delay or omit to execute such process, whereby such person shall escape, he shall be punished by imprisonment in the county jail, not more than one year, or by fine not exceeding one hundred dollars.³

The whole duty of the officer is to serve the precept, and make due return. He has no power to become a party to an amicable adjustment of difficulties, and no justification or excuse can be imagined for an officer who wilfully disobeys the warrant.

Where the court has jurisdiction of the offence charged in the complaint, and the warrant is in legal form, and is directed to the officer, it is not for him to inquire into the regularity of the proceedings of the court that issued the warrant; and he cannot be considered as a trespasser for acting under it.⁴

¹Ch. Cr. L., 54—13 Mass. 289.

²Ch. Cr. Law, 53.

³R. S. ch. 153, sec. 20.

⁴8 Met. 328.

Chief justice Shaw, of the supreme judicial court of Massachusetts, says: "As a general rule the officer is bound to see that the process which he is called upon to execute, is in due and regular form, and issues from a court having jurisdiction of the subject. In such case he is justified in obeying his precept, and it is highly necessary to the due, prompt and energetic execution of the commands of the law that he should be so. It is incomprehensible, says Lord Kenyon, in *Belk v. Broadbent*, 3 T. R. 185, to say that a person shall be considered as a trespasser who acts under the process of the court. *Tarlton v. Fisher*, 2 Doug. 671, was trespass for assault and false imprisonment of a certified bankrupt. Some doubt arose upon the statute, that such person shall not be liable to be arrested. But it was held that though the debtor might have a *supersedeas* to the execution, yet that till superseded, it was a justification; and even after *supersedeas*, though trespass would lie against the party, it would not lie against the sheriff. And this is stated to be the settled practice. The inconvenience would be very great if the law were otherwise.

"On an execution against a corporation styled the president, directors, and company of a turnpike, the officer arrested and committed one of the proprietors. [4 Mass. 232.] Here indeed he was held liable, because the plaintiff was not named nor described in his precept; the corporate name not being the description or designation of any natural person whatever. But Parsons C. J. there affirms the general rule, and illustrates it by reference to an executor or administrator not liable to arrest. 'If,' says he, 'an execution should illegally issue against the body of an executor or administrator, on a judgment against the estate of the deceased, the officer might be justified in arresting the body of the executor or administrator, as he did not mistake his precept, which issued from a court having jurisdiction.' The same rule was recognized in *Sanford v. Nicholas*, 13 Mass. 288, where Parker C. J. says it will not do to require of executive officers, before they shall be held to obey precepts directed to them, that they shall have evidence of the regularity of the proceedings of the tribunal which commands the duty. Such a principle would put a stop to the execution of legal process.

"If the plaintiff in such case has any remedy, it is not against the officer, who has simply executed the regular precept of a court having

jurisdiction, but by applying for his discharge out of custody, or by an action on the case against the party who thus wrongfully armed the officer with power to arrest him, upon the ground of its being, on his part, a malicious arrest."¹

It is now clear that in all cases doors may be broken open, if the offender cannot otherwise be taken, under a warrant for treason, felony, suspicion of felony, or actual breach of the peace, or to search for stolen goods. And if, in the attempt to execute a lawful warrant by breaking into the house of a felon, after a previous demand of admittance, the officer be killed by the party attempting to resist, it will be murder in all concerned; and if, on the other hand, he unavoidably kill any of the parties opposing him, the homicide will be justifiable, because in furtherance of justice. And even where there is some error in the process which does not affect the justice of the case, the completion of the offence of the party resisting will not be varied.²

But the officer should, in all cases, as a precautionary measure, demand admittance first.

This right to break doors extends to the house of a third person, if the offender fly to it for refuge; and, in such case, such house may be broken open after the usual demand. But then it is said, it is at the peril of the officer that the party, against whom he has obtained the warrant, be found there; for otherwise he will be a trespasser, and when the officer, after obtaining admittance, is locked in, or otherwise prevented from retiring, he may lawfully break out by any means in his power, whether he be engaged in executing civil or criminal process. And the sheriff may break open the door of a house to rescue his deputies unlawfully detained within it. And when once an officer has entered a house, either upon civil or criminal process, he may, after ineffectually demanding entrance, break open any inner door that obstructs his progress.³

When arrests may be made. A person may be apprehended in the night as well as the day.⁴

The exemption from arrest by statute in civil proceedings "from midnight preceding to midnight following the Lord's day,"⁵ does not affect processes against offenders for treason, felonies, or breaches of

¹Met 257.

²Ch. Cr. L., 55.

³Ib. 58.

⁴1 N. H. 346—Ch. Cr. L. 13.

⁵R. S. ch. 114, sec. 104.

the peace; so that warrants against any persons charged with any crimes whatever, may be lawfully served on that day.

Warrants, if made returnable at any particular time, become dead when that time has expired; and any action after that time, had under them, is illegal and void. But if no time is specified within which an officer shall return his process, it continues in force until it is fully executed and obeyed.

Where arrests may be made. An important branch of the law, under this head, has already been treated of, while considering the right to force dwelling houses to arrest offenders. It remains to consider only how far an officer's authority extends.

When a person against whom a warrant has been issued for an alleged offence, committed in any county, shall, before or after issuing the warrant, have removed or escaped from or be out of the county, the sheriff or deputy, to whom the warrant is directed, may pursue and apprehend the party charged, in any county in the State; and may for that purpose, command aid, as in his own county, and convey him into the county in which the offence was committed.¹

Where the offence charged in the warrant is not punishable with death or imprisonment in the State prison, the person arrested, if he shall request it, may be carried before any justice in the county in which the arrest was made, for the purpose of entering into a recognizance, without any trial or examination, and it shall be the duty of the officer so to carry him.²

If the magistrate in the county where the arrest was made, shall refuse to let to bail the person arrested and brought before him, or if no sufficient bail be offered, the person, having him in charge, shall take him before some magistrate of the county in which the warrant was issued, to be proceeded with according to law.³

When the offence charged is punishable with death, or by imprisonment in the State prison, the officer making the arrest in some other county, shall convey the prisoner to the county where the warrant was issued, and he shall be proceeded with according to law.⁴

Every person arrested by warrant for any offence, where no provision is made for his examination thereon before any other justice of the

¹R. S. ch. 171, sec. 3.

²Ib. sec. 4.

³Ib. sec. 6.

⁴Ib. sec. 7.

peace, must be brought before the magistrate who issued the warrant; or, if he be absent or unable to attend, before any other magistrate of the same county; and the warrant, with a proper return thereon, signed by the person who made the arrest, must be delivered to the magistrate.¹

Of commanding assistance. If any person, being required in the name of the State, by any sheriff, deputy sheriff, coroner or constable, shall neglect or refuse to assist any of them in the execution of their office, in any criminal case, or in the preservation of the peace, or the apprehending and securing any person for a breach of the peace, or in any escape or rescue of persons arrested on civil process, he shall be punished by imprisonment in the county jail, not more than thirty days, or by fine not exceeding fifty dollars.²

If any justice of the peace, upon view of any breach of the peace, or any other offence proper for his cognizance, shall require any person to apprehend and bring before him the offender therein, the person who shall refuse or neglect to obey, shall be punished as above provided.³

A verbal request for assistance is sufficient, and the aid or assistant, acting under such request, would be under the same protection of the law as the sheriff himself.⁴

Neither is it necessary that the officer should be in sight at the time an arrest is made by his aid; provided, it be believed they were both pursuing one business or object; and an arrest by the aid or assistant under such circumstances would be to all intents and purposes as valid, as if the same had been made by the sheriff personally.⁵

The officer making the arrest should bring the prisoner before the magistrate as soon as may be reasonably and conveniently done. If he is guilty, he should be put in a situation to meet the reward for his offences without delay; and if innocent, he is entitled to be discharged, without being unreasonably detained on an unjust charge.

But if the time be unseasonable, as at or near the night, whereby he cannot attend the justice, or if there be danger of a rescue, or the party be ill, and unable at present to be brought, he may, as the case

¹Ib. sec. 8.

²R. S. ch. 158, sec. 26.

³Ib.

⁴13 Mass. 321.

⁵Ib.

shall require, secure and detain him till the next day, or until it may be reasonable to bring him.¹

When an arrest has been made without warrant, the officer may, in some instances, take the party's word for his appearance before the magistrate; and in practice, where the charge is of a trifling nature, and the defendant is of good repute, officers take upon themselves the responsibility of so doing.²

If an officer, having arrested a party under a warrant, suffer him to go at large, under a promise to surrender himself and find sureties, the better opinion is that he can afterwards arrest him on the same process.³

And it is clear that, where the prisoner has *escaped* from the officer, without any consent on his part, the officer is justified in retaking him.⁴

This right of retaking also extends to the case where the person arrested is rescued. And in both, the justice may also grant a fresh warrant, reciting the former proceedings, the escape or rescue, and directing the apprehension of the offender.⁵

A rescue signifies a forcible setting at liberty, against law, of a person duly arrested. It is necessary that the rescuer should have knowledge that the person whom he sets at liberty has been apprehended for a criminal offence, if he be in the custody of a private person; but if he be under the care of an officer, then he is to take notice of it at his peril.

If any person shall convey into jail, or other place of confinement, any disguise, instrument, arms, or other thing, proper or useful to aid any prisoner in making his escape, and with intent to facilitate the escape of any prisoner, there lawfully detained for any criminal offence, whether such escape be effected or attempted, or not; or shall, by any means, aid or assist any such prisoner to escape, whether such escape be effected or not; or shall forcibly rescue any prisoner, held in custody for any criminal offence, he shall be punished, when such prisoner was imprisoned or in custody for any felony, by imprisonment in the State prison not more than seven years; and when such prisoner was imprisoned or in custody for any offence, not a felony, by imprisonment in

¹Chitty's Cr. L. 59—10 Wend. 514.

⁴Ib. 60.

²Chitty's Cr. L. 59.

⁵Ib. 62.

³Ib.

the county jail, not more than one year, or by fine not exceeding five hundred dollars.¹

When the party accused is already in custody on a civil action, he may be there charged criminally, by leaving with the jailer, or officer in whose custody he may be, the warrant from the justice.

The officer, on the termination of the civil imprisonment, takes the party before the justice of the peace, by whom he is examined, discharged, bailed or committed, as on an original accusation.²

When the party is already in jail on a criminal charge, and fully committed for trial, the examination may be had at the jail, or at some convenient place near thereto, where the party may be present with the jailer. And it should in no event be conducted in the absence of the party, as he has the right, in a matter affecting his liberty, to be personally present at the hearing and examination.³

Search warrants. In the service of these, as of all other warrants, the officer will be protected in all legal acts under a warrant proper upon its face, though it may have been illegally issued.⁴

But he will look well to it that it contains a particular description of the property to be searched for, and the place to be searched, as else the precept will not avail him in defence of a suit against him for acts committed under it.⁵

In the execution or service of search warrants, the following principles seem to be established :

1. That the warrant should be served in the day time, unless in case of necessity, and upon positive proof.
2. That the complainant should accompany the officer, in order to identify the goods.
3. If the doors are open, the officer may enter the suspected house, with his assistants, whether the goods are there or not.
4. If the doors are shut, the officer, after demand and refusal, may break them.
5. If, upon trial, it appears to the justice that the goods were stolen, he should lodge them in the officer's hands, who should keep them safely until the court. If the goods were not stolen, they should be returned to him from whose possession they were taken.

¹R. S. ch. 158, sec. 25.

²Dav. Just. 81.

³Ib. 82.

⁴18 Mass. 238.

⁵Ib. 239.

6. If the possessor knew not that they were stolen, he should be discharged as an offender, and recognized as a witness.

II. OF THE RETURN.

Every person arrested by warrant for any offence, where no provision is made for his examination thereon before any other justice of the peace, shall be brought before the magistrate who issued the warrant; or, if he be absent or unable to attend, before any other magistrate of the same county; and the warrant, with a proper return thereon, signed by the person who made the arrest, shall be delivered to the magistrate.¹

The officer, who shall arrest any person, charged as principal or accessory in any larceny, or with buying, receiving, or concealing stolen property, shall secure the property alleged to have been stolen, and shall be answerable for the same; and shall annex a schedule thereof to his return; and upon conviction of the offender, the stolen property shall be returned to the owner.²

As in civil proceedings the return is made upon the back of the writ, so in criminal it is made upon the back of the warrant. The return, being the legal evidence of the service, is alike necessary in both. And in both it should state generally the mode of service, be signed by the officer, and a certificate of his fees be also annexed.

¹R. S. ch. 171, sec. 8.

²R. S. ch. 156, sec. 14.

CHAPTER IV.

ARRAIGNMENT, PLEADINGS, TRIAL AND WITNESSES.

THE Revised Statutes have made certain many points of practice formerly considered doubtful. But it is manifestly impossible to reduce into a statute minute directions as to the whole course of proceedings, the various pleadings and issues which may arise, the effects of different pleas, the admissibility of witnesses, the kind of evidence required, and the credit to be attached to the various shades and classes of testimony.

Every person arrested by warrant for any offence, where no provision is made for his examination thereon before any other justice of the peace, must be brought before the magistrate who issued the warrant; or if he absent or unable to attend, before any other magistrate of the same county; and the warrant, with a proper return thereon, signed by the person who made the arrest, must be delivered to the magistrate.¹

Any magistrate may adjourn an examination before himself, from time to time, not exceeding ten days at one time, and may take the recognizance of the party accused, with sufficient sureties, for his personal attendance for the purpose before such magistrate; but if the party is charged with a capital offence, he must be committed to prison in the mean time.²

If the party so recognized do not appear, at any time appointed, before the magistrate, for further examination, the magistrate shall record the default, and certify his recognizance, with the record of the default, to the district court; and the like proceedings shall be had thereon, as on a breach of the condition of a recognizance for appearance before the court.³

When such person shall fail to recognize, he may be committed to prison by an order from the magistrate, stating, in a summary manner,

¹R. S. ch. 171, sec. 8.

²R. S. ch. 171, sec. 10.

³Ib. sec. 9.

the offence with which he is charged, that he committed him for further examination on a future day, named in such order; and on the day appointed, he may be brought before the magistrate, by his verbal order to the same officer by whom he was committed, or by a written order to a different person.¹

When a person, charged with the commission of an offence, is brought before a magistrate, he shall first examine under oath the complainant and witnesses to support the prosecution, in presence of the party charged, as to all pertinent facts.²

Afterwards the witnesses for the prisoner shall be sworn and examined, and he may be assisted by his counsel in the examination, and in the cross-examination of the complainant and his witnesses.³

The witnesses against and for the prisoner may be examined, each one separately from all the others; and the magistrate may keep the witnesses for the prisoner separate from those against him, during his examination, according to his sound discretion.⁴

When the magistrate may think it necessary, he shall reduce to writing the testimony of any witness, and require him to sign it.⁵

If, on examination, it shall appear on the whole evidence, that no offence has been committed, or that there is not probable cause for charging the prisoner with an offence, he shall be discharged.⁶

But if it shall appear that an offence has been committed, and that there is probable cause to believe the prisoner to be guilty, and if the offence be bailable by such magistrate, and sufficient bail be offered, it shall be taken, and the prisoner discharged; but if the offence is not bailable by the magistrate, or no sufficient bail be offered, the prisoner shall be committed to prison to await a trial. If the offence charged be within the jurisdiction of such justice, he may proceed to try the same, and award sentence thereon.⁷

We shall now consider

1. The arraignment.
2. The pleadings.
3. The nature and admissibility of evidence.
4. The trial.

¹R. S. ch. 171, sec. 11.

²Ib. sec. 12.

³Ib. sec. 13.

⁴Ib. sec. 14.

⁵Ib. sec. 15.

⁶Ib. sec. 16.

⁷Ib. sec. 17.

I. THE ARRAIGNMENT.

The arraignment consists of three parts: 1. Calling the prisoner to the bar by his name; 2. Reading the complaint to him distinctly in English, that he may understand the charge; 3. Demanding of him whether he is guilty or not guilty.

The magistrate first calls upon the prisoner by his name, to be sure of his identity, requiring him to rise, and hearken to the complaint brought against him. The prisoner should then rise, and listen to the reading of the complaint, which is accordingly read to him by the magistrate, clearly and distinctly.

The magistrate having finished reading the complaint, demands of the prisoner, "What say you to this complaint? Are you guilty or not guilty?"

In doing this, if the offence be one of any magnitude, he should caution the prisoner against making any confessions or admissions which may prejudice him on his trial, and perhaps might sometimes go so far as to advise him against such a course.

If the prisoner plead to this that he is guilty, no trial of course follows. The magistrate enters in his docket that the prisoner appears, is arraigned, and pleads guilty. He then proceeds to impose the sentence of the law upon the offence, a minute of which is likewise made in the same place.

When any person, indicted for any crime or offence, shall stand mute and make no answer to the charge, the court shall order the plea of not guilty to be entered, and the same proceedings shall be had, as if he pleaded not guilty.¹

The prisoner may also impliedly confess his guilt by pleading *nolo contendere*—which means that he is unwilling to contend with the State and throws himself on the mercy of the court. It is discretionary with the court to receive it or not. The advantage which a party obtains by such an answer is, that he is not stopped from pleading *not guilty* to an action for the same facts, as he would be upon a plea of *guilty*.²

If he receives the plea, the magistrate will enter it in his docket, and

¹R. S. ch. 172, sec. 16.

²9 Pick. 207.

will proceed to sentence him; of which sentence, as of all other proceedings, he will enter the proper minutes.

If the party do not plead guilty, or stand mute, or confess and throw himself on the mercy of the court, but one other course is left him, namely—to plead in defence, either by taking measures to dismiss the proceedings, pleading specially matter in bar, or generally that he is *not guilty*.

II. THE PLEADINGS.

These form the issue which the State is to join with the defendant, and which, of course, are preliminary to the hearing and examination.

In ordinary cases no plea is put in except the general plea of “not guilty.” But as a party is entitled to all the pleas and matters of defence before a justice for an offence within his jurisdiction, that he is by law entitled to in a trial in the higher courts, it has been thought advisable to devote a few words to the mode of forming the various issues in criminal proceedings.

It may in this connection be remarked that when, in the course of a suit from any cause, a party is placed in such a situation that justice cannot be done in the trial, without the aid of the information to be obtained by means of a specification or bill of particulars, the court has power to direct such information to be seasonably furnished, and in an authentic form; and that such an order may be effectual and accomplish the purpose intended by it, the party required to furnish a bill of particulars, must be confined to the particulars specified.¹

This rule applies as well to civil as criminal proceedings, and the remarks upon bills of particulars in a former part of this treatise may be referred to in this connection.²

Such a bill of particulars constitutes no part of the record, and is not open to demurrer.³

Pleas may be—1. Pleas to the jurisdiction of the justice; 2. Demurrers; 3. Pleas in abatement. 4. Pleas in bar. Besides these there may be motions to quash, which are of the same nature and governed by the same rules as motions to dismiss in civil proceedings.

When a motion to dismiss can be entertained is considered in a previous part of this volume.⁴ It is there said that it can be entertained only

¹15 Pick. 331.

²See Page 50.

³11 Pick. 435.

⁴See Page 44.

when the matter of exception is apparent upon the face of the proceedings, or, more plainly, when the magistrate may have information of the defect, without proof of facts apart from the papers before him.

The same rule prevails in criminal proceedings. If, for instance, it appears in complaint for a petty larceny before a magistrate in the county of Cumberland that the offence was committed within the county of York, and more than one hundred rods from the boundary, and the fact appears by the complaint itself, it may be taken advantage of by a motion to quash the complaint.

A correct practitioner will reduce to writing all motions to quash, pleas in abatement, demurrers, pleas to the jurisdiction, and special pleas in bar, upon each of which, as upon all papers, the magistrate should, as in civil proceedings, note the day of the filing, and attest the same, and should also, as in every thing else done in the case, minute in his docket what has been done.

A plea to the jurisdiction may be made where a justice undertakes to try and decide upon an offence of which he has no cognizance, and may be made without answering to the complaint.

A demurrer admits, for the time, the truth of the matter alleged, and denies that it constitutes in law an offence. The demurrer puts the legality of the whole proceedings in issue, and compels the court to examine the validity of the whole record. When once a demurrer is filed, the defendant cannot withdraw it without the consent of the complainant, or at least without the permission of the court. The judgment on a demurrer in felonies, if for the State, is that the defendant answer over; in misdemeanors, a conviction. A demurrer is seldom resorted to in criminal practice.¹

When a plea in abatement, or other dilatory plea to an indictment, is offered, the court may refuse to receive it, until the truth of it shall be proved by affidavit, or other evidence.²

Pleas in bar have been divided into—1. A former acquittal; 2. A former conviction; 3. Matter of record, pardons, &c.; 4. Not guilty; 5. Special pleas.

The first two pleas are founded on the principle that no man shall be placed in peril of legal penalties more than once on the same accusation.³

¹Chitty's Crim. Law, 439—444.

²Ch. Cr. Law, 434.

³R. S. ch. 172, sec. 27.

No person can be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.¹

The essence of a plea of former acquittal is that the defendant has been acquitted of the same offence in due form, by a court competent to make a final disposition.²

The general rule laid down in the books is that the previous complaint or indictment must have been one on which the defendant could have been legally convicted, upon which his life or liberty was not merely in imaginary but in actual danger, and consequently in which there was no material error.³

The test formerly in determining whether a former acquittal, admitted to be for the same offence, could be pleaded in bar, was, whether in fact the party pleading had before been put in jeopardy. And, where the indictment was deficient in form or substance, and no judgment could be rendered on it, because it was to be deemed a nullity, wholly inoperative and void, and upon which no judgment could be rendered, it was said that here the party, not having been put in jeopardy by the first arraignment, could not offer the acquittal in bar to a second indictment for the same offence.⁴

The plea of a former acquittal or former conviction must be on a prosecution for the same identical act and crime. It must therefore appear to depend upon facts so combined and charged as to constitute the same legal offence or crime. It is obvious, therefore, that there may be great similarity in the facts, where there is a substantial legal difference in the nature of the crimes; and on the contrary there may be considerable diversity of circumstances, where the legal character of the offence is the same.⁵

¹Const. U. S. Amendments, Art. v.—²Ch. Cr. L., 454
 Const. of Maine, Art. 1, sec. 8. ³12 Pick., 502.
²11 N. H., 156. ⁴Ib. 503.

In considering the identity of the offence, it must appear by the plea that the offence charged in both cases was the same *in law* and *in fact*. The plea will be vicious, if the offences charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact. But it is not necessary that the charges in the two indictments should be precisely the same; it is sufficient if an acquittal from the offence charged in the first indictment virtually includes an acquittal from that set forth in the second, however they may differ in degree.¹

The true test to determine whether an acquittal or conviction upon one indictment is a good bar to another has been declared as follows; "Unless the first indictment were such as the prisoner might have been convicted upon, by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second."²

When the plea is found against the defendant, he will be put to plead again to the indictment, or complaint, and the trial will proceed as if no previous proceedings had passed.³

It hardly need be said that a former conviction, procured by fraud of the defendant, is no bar to a subsequent prosecution for the same offence.⁴

Besides these, the defendant may plead any other special matter in law, or he may plead the general issue, that he is not guilty. This last is generally done verbally; the others should be done in writing, the magistrate minuting on the back the day of the filing, and attesting the same as in civil proceedings. And it may be observed that the defendant cannot plead both special matter in bar, and the general issue, because duplicity is not allowed in pleadings.⁵

When the defendant has any special matter to plead in abatement or bar, as a misnomer, a former acquittal or conviction, &c., he should plead it at the time of the arraignment, before the plea of not guilty.⁶

And when he once has pleaded, he is bound to abide by the defence which he has chosen, and cannot, as a matter of right, withdraw it, in order to rely on another. But a plea of not guilty may be withdrawn in order to confess the complaint. And the court may allow the defendant, as a matter of favor, to withdraw the plea of the general issue,

¹12 Pick. 503.

²Ib.

³13 Mass. 460.

⁴1 N. H. 257.

⁵1 Ch. Cr. L. 472.

⁶Ib. 435.

and object to the jurisdiction before which the trial is to proceed. So leave will, in some cases, be granted to the defendant to withdraw a plea, and enter a demurrer in its place ; and by leave a demurrer may be withdrawn.¹

III. THE NATURE AND ADMISSIBILITY OF EVIDENCE.

1. *Witnesses.* In a former part of this work, we have treated of the nature and admissibility of evidence in civil proceedings, the method of restoring the competency of witnesses, the mode of administering the oath, and the power of compelling the attendance of witnesses. The general principles are the same in both civil and criminal proceedings.

The constitution of the United States provides that in all criminal prosecutions, the accused shall enjoy the right to a speedy and just trial ; to be confronted with the witnesses against him ; and to have compulsory process for obtaining witnesses in his favor.²

It also provides that no person shall be compelled, in any criminal case, to be a witness against himself.³

The same provisions are incorporated into the constitution of Maine.⁴

As the rights of the accused are protected, so are those of witnesses. It is a well understood rule of law that, in no event, can a witness be obliged to testify to any facts which tend to criminate himself. It sometime happens that a witness tries to screen an offender, by refusing to answer pertinent questions, because the answer will criminate himself. When such is the case, the magistrate will remember that the answer must be one disclosing some matter involving a direct criminal accusation against the witness. It is not enough that it will involve him in pecuniary loss or injure his reputation, if it do not expose him to a criminal prosecution, or subject him to a penalty or forfeiture.⁵

But if the fact to which he is called upon to testify would thus subject him to a penalty or forfeiture, or expose him to a criminal prosecution, he is not bound to answer it. And he is not only not compelled to answer such a question, but he will also be protected in refusing to disclose any fact, if a full account of his knowledge of such

¹Ch. Cr. Law, 436-7.

²Const. U. S. Amend. Art. 6.

³Ib. Art. 5.

⁴Const. of Maine, sec. 6.

⁵22 Pick. 476.

fact would so expose him.¹ But if he voluntarily state a fact, he is bound to state how he knows it, though in so doing he may expose himself to a criminal charge.²

A witness was called to prove the fact of his poverty, to which he spoke fully. He was then inquired of whether he had not property to a considerable amount some years previous, which he admitted. He was then asked how said property had been disposed of, to which he replied, that he could not disclose without subjecting himself to prosecution for a crime. Held that he might claim privilege.³

The court are the judges of the tendency of the inquiry. And if the magistrate is satisfied that the question proposed has a tendency to charge the witness criminally, he will not compel an answer.⁴

But although no person can be compelled to furnish evidence against himself, no species of testimony is more common in criminal proceedings than confessions or admissions of the prisoner.

Such confessions or admissions should be taken with caution. Their value depends on the supposition that they are both deliberate and voluntary. For, besides the danger of mistake from the misapprehension of witnesses, the misuse of words, the failure of the party to express his own meaning, and the infirmity of memory, it should be recollected that the mind of the prisoner himself is oppressed by the calamity of his situation, and that he is often influenced by motives of hope and fear to make an untrue confession. The case of the Boons in Vermont, is a familiar instance of a deliberate confession of guilt by two innocent men, made in the hope of thereby saving themselves from an unjust punishment. Misjudging friends advised them to this course, to avoid a certain conviction on strong circumstantial evidence; and one of them barely escaped the severest penalties of the law, by the return of the man, supposed to be murdered, before the day of the execution. The zeal, too, which so generally prevails to detect offenders, especially in cases of aggravated guilt, and the strong disposition, in the persons engaged in the pursuit of evidence, to rely on slight grounds of suspicion, which are exaggerated into sufficient proof, together with the character of the persons necessarily called as witnesses in cases of secret and atrocious crime, all tend to impair this species of

¹9 N. H. 110.

²4 N. H. 562.

³9 N. H. 110.

⁴21 Pick. 186.

evidence, and sometimes lead to its rejection where, in civil proceedings it would have been received.¹

Confessions are divided into two classes—*judicial* and *extrajudicial*.

Judicial confessions are those which are made before magistrates or in court, in the due course of legal proceedings. And it is essential that they be made of the free will of the party, and with full and perfect knowledge of the nature and consequences of the confession; and of this kind is the plea of guilty.²

When the party is brought before the magistrate, he should be cautioned that he is not bound either to accuse himself, or confess his guilt, and that any confession or admission of that nature may be produced in evidence against him on his trial. And at all events, no improper influence, either by threats or promises, ought to be employed; for, however slight the inducement may have been, a confession so obtained cannot be received in evidence.³

So too, he should be careful that he be not imposed upon by collusive confessions. An illustration in point is given in Davis's Justice.

Two brothers committed a robbery, and fled. The younger brother, who was innocent, in order to favor their escape, when examined, dropped hints amounting to a constructive admission of his guilt; on this he was committed to prison, and the pursuit of his brothers discontinued. On his trial he proved an *alibi*, and obtained an easy acquittal; and in the mean time the actual felons escaped with their plunder.

Extra-judicial confessions are those which are made elsewhere than before a magistrate or in court; this term embracing not only explicit and *express* confessions of crime, but all those admissions of the accused from which guilt may be *implied*. All confessions of this kind are receivable in evidence, being proved like other facts, to be weighed by the magistrate.⁴

A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the

¹ Green. on Ev., sec. 214 and note.

²Ib. sec. 216.

³Davis's Just. 107.

⁴1 Green. on Ev., sec. 216.

torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it, and therefore it is rejected.¹

But where a verbal confession is made, under hopes of pardon, or of mercy, or of favor held out as inducements, and those hopes are realized, and the prisoner makes a second confession, voluntarily, and not induced by any persuasion or external influence, though the evidence of the verbal confession would be excluded on the principle above stated, yet the written confession may be used in evidence, because the motive supposed to have induced the first confession, being removed, must have ceased to operate.²

And whenever it appears that the influence of the promises or threats had been wholly done away with before the confession was made, the confession will be received.³

If the party has made his calculation of the advantages to be derived from confessing, and thereupon confesses, there is no reason to say that it is not a voluntary confession. It seems that, in order to exclude a confession, the motive of hope or fear must be directly applied by a third person, and must be sufficient, in the judgment of the court, so far to overcome the mind of the prisoner, as to render the confession unworthy of credit.⁴

Greenleaf on Evidence thus illustrates the rule under consideration: Where the prosecutor said to the prisoner, "Unless you give me a more satisfactory account, I will take you before a magistrate," evidence of the confession was thereupon rejected. It was also rejected where the language used by the prosecutor was, "If you will tell me where my goods are, I will be favorable to you;"—where the constable who arrested the prisoner said, "It is of no use for you to deny it, for there are the man and boy who will swear they saw you do it;"—where the prosecutor said, "He only wanted his money, and if the prisoner gave him that, he might go to the devil if he pleased;"—and where he said he should be obliged to the prisoner if he would tell all he knew about it, adding, "If you will not, of course we can do nothing," meaning nothing for the prisoner. So, where the prisoner's superior officer in the police said to him, "Now be cautious in the

¹10 Pick. 490.

²Ib.

³1 Green. on Ev., sec. 221.

⁴Ib. sec. 220, n. 5.

answers you give me to the questions I am going to put to you about the watch," the confession was held inadmissible.¹

Though it is necessary to the admissibility of the evidence that the confession should have been made voluntarily, yet it is not necessary that it should have been the spontaneous act of the prisoner. It will be received though it were induced by spiritual exhortations, whether of a clergyman or any other person ; by a solemn promise of secrecy, even confirmed by an oath ; or by reason of the prisoner's having been made drunken ; or by promise of some collateral favor, having no reference to the criminal charge ; though deception may have been practised, if the deception did not hold out inducement to make a false confession ; and even though it were drawn out by questions.²

In the proof of confessions it is material that the whole of what the prisoner said should be put in. The statement of the prisoner may have been limited. Qualifications may have been annexed to it, either entirely removing his guilt, or materially qualifying its degree. Sound reason, good law, and common humanity, terms it is hoped not at all opposed to each other, alike point out such a course as absolutely necessary.

Much that has been said on the subject of confessions, applies only to direct confessions by the prisoner of his guilt. We have seen that there may also be implied confessions. A familiar instance of this is the finding of stolen property in the place where the prisoner directed a search. This is strong presumptive proof that he concealed it there, and as such is pertinent evidence to the issue. The confirmation of the statement makes it proper to inquire whether he confessed that it was concealed there, and whether it was there found. But the inquiry is limited at this point ; and it would not be proper to go into the inquiry whether he confessed that he concealed it there. And as the admissibility of the evidence rests on the confirmation of the story, if the search proves ineffectual, no proof either of the confession or the search will be received.³

The confessions of an accomplice are sometimes offered in evidence. These partake more of the nature of the admissions of a partner or agent. As in civil cases, when once the fact of an agency or partner-

¹1 Green. on Ev., sec. 221.

²Ib. secs. 231-2.

³Ib. sec. 229.

ship is established, the acts and declarations of one, in furtherance of the common business, are deemed binding on the other, so in cases of conspiracy, riot, or other crimes, when once the conspiracy or combination is established, the acts or declarations of each in the prosecution of the enterprise, are binding on all. But the rule ceases with the combination, and acts made after the termination of the partnership in crime, whether by the success or abandonment of the enterprise, are inadmissible.¹ These confessions, however, are to be taken with great caution, and must be corroborated by other evidence, as the accomplice usually anticipates some advantage to himself by the confession.

In this connection it may be well to state certain provisions of the Revised Statutes relative to the admissibility of evidence in certain criminal cases.

In prosecutions for forging or counterfeiting any notes or bills of the banks of the State, or for uttering, publishing, or tendering in payment as true, any forged or counterfeit bank bills or notes, or for being possessed thereof with intent to utter and pass the same as true, the testimony of the president or cashier of any bank may be dispensed with, if he resides out of the State, or more than forty miles from the place of trial; and any other person acquainted with the signature of such officers, or having knowledge of the difference between the true and counterfeit bills of such bank, may be admitted as a witness, to prove that the same are forged or counterfeit.²

In prosecutions for forging, altering, or counterfeiting any public security, issued under the authority of the United States, or of any State or territory, or for uttering and publishing the same, or being possessed thereof with intent to utter and pass the same, the certificate under oath of the secretary of the treasury, or treasurer of the United States, or of the secretary or treasurer of any State or territory, on whose behalf such security purports to be issued, of the tenor of the true bill of credit or other public security alleged to be forged or altered, shall be admitted in evidence.³

In the act for the suppression of drinking houses and tippling shops passed June 2, 1851, it is provided that the prosecutor or complainant may be admitted as a witness in the trial.⁴

¹Ib., sec. 223.

²R. S. ch. 157, sec. 10.

³Ib. sec. 11.

⁴Acts of 1851.

The same rule in regard to parties to the record prevails in criminal as in civil proceedings. They are not suffered to testify in their own favor, nor are they compellable to furnish evidence against themselves; where, therefore, two were indicted for uttering a forged note, and the trial of one was postponed, it was held that he could not be called as a witness for the other.¹

The rule ceases to operate when the witness offered ceases to be a party to the record. After one of several defendants has been convicted by his own confessions or otherwise, and the conviction does not make him incompetent, there seems to be no good reason why he should not be allowed to testify for or against the other defendants; for, after conviction, he is no longer a party to the issue.²

A distinction in the proof required of the commission of offences within the final, and those within the initial, jurisdiction of a magistrate should be noticed, before proceeding further.

Undoubtedly, in matters within his final jurisdiction, the same strictness of proof is necessary as in criminal proceedings in higher courts. The presumption of law is in all cases in favor of the innocence of a man till he is proved guilty.

But the same strictness of proof is not required, where the magistrate has no right to exercise final jurisdiction over the offender. If, in such case, it manifestly appears either that no crime was committed, or that there are no circumstances connecting the prisoner with its commission, unquestionably it is the duty of the magistrate to discharge him.

The justice is merely to satisfy himself that "there is *probable cause* to believe the prisoner guilty."³

2. *Proofs.* No evidence is admissible, which does not tend to prove or disprove the issue joined.

Evidence is divided into—

1. *Prima facie.*
2. Conclusive.
3. Direct.
4. Circumstantial.

¹10 Pick. 57.

²Ib.

³R. S. ch. 171, sec. 17.

Prima facie evidence is that which raises the degree of probability in favor of the hypothesis, but which can, nevertheless, be rebutted.

Conclusive evidence, on the other hand, tends to exclude any other hypothesis than the one attempted to be established.

Direct evidence is the testimony of those who speak from their own actual personal knowledge of the thing to be proved. It differs from circumstantial evidence, in that the proof applies immediately to the fact to be proved, without any intervening process, and is therefore called *direct* or *positive* testimony.¹

Circumstantial evidence is evidence not directly proving or disproving the allegations, but proving some other matters from which the truth or falsehood of the allegations is to be inferred. It is allowed, not because it is necessary, but because it is capable of the highest degree of moral certainty.

The following principles have been said to be essential to the validity of circumstantial evidence :

First. The circumstances from which the conclusion is to be drawn should be fully established.

Second. All the facts should be consistent with the hypothesis.

Third. The circumstances should be of a conclusive nature and tendency.

Fourth. The circumstances should, to a moral certainty, exclude every hypothesis but the one proposed to be proved.

Fifth. Circumstantial evidence ought in no case to be relied upon, where direct or positive testimony is withheld wilfully by the prosecutor.

IV. OF THE TRIAL.

The arraignment is preliminary to the trial. When this is completed, the plea put in, and the issue joined, the counsel for the State, if any appears, opens the case on the part of the government, stating what he expects to prove, and calling his witnesses, who are to be sworn and examined. If no counsel appears for the government, the presiding magistrate will himself put such questions as may be necessary to elicit the truth, guarding carefully against exhibiting or permitting himself to feel any bias, either in favor of the State or the accused.

¹ Green. on Ev., sec. 13.

As in civil proceedings, so here, each party has in turn the right of cross examination.

We have already seen that a magistrate may, while examining a witness, exclude all other witnesses from the place of examination; and that he may also, if requested, or if he see fit, direct the witnesses for or against the prisoner to be kept separate, so that they cannot converse with each other, until they shall have been examined.¹

We have also seen that he may, if he see fit, reduce the evidence to writing, and cause it to be signed by the witness.²

After the witnesses for the government have been examined and cross examined, the defendant opens his case, stating the grounds of his defence, and what he expects to prove. He then calls his witnesses, who are in their turn subjected to a cross examination.

If the government has any rebutting testimony, it is put in, in this stage of the case. But evidence merely additional to what has been already offered, should not be received in rebutter. If the defendant has any thing farther to offer, he follows with it in reply. When the evidence is all in, the counsel have the right, if they see fit, to comment upon it, to which comments the magistrate will give such weight as they deserve. He will then adjudicate upon the facts and the law presented in the issue, applying each to the other, and remembering that the burden of proof is upon the government, if the offence be one within the final jurisdiction of a magistrate, to prove the guilt of the accused beyond all reasonable doubt, and if the offence be one beyond his final jurisdiction, at least to raise a reasonable suspicion connecting the party on trial with the commission of the alleged offence.

¹See Page 204.

²Ib.

CHAPTER V.

OF CONVICTION, SENTENCE, APPEAL AND RECOGNIZANCE.

I. CONVICTION.

THE remarks which follow, in this chapter, are applicable alone to offences within the final jurisdiction of a magistrate. In offences beyond that, he has no authority to convict or sentence, and, of course, there can be no appeal.

No person charged with any offence against the law, shall be punished for the same, unless he shall have been duly and legally convicted thereof, in a court having competent jurisdiction of the cause and person.¹

When any person shall be legally convicted of any offence, for the punishment of which no provision is made by statute, the court shall award such sentence as is conformable to the common usage and practice in this State, according to the nature of the offence, and not repugnant to the constitution.²

All imprisonments for a less term than one year shall be in the county jail or house of correction.³

Whenever it is provided, that an offender shall be punished by imprisonment and a fine, the court may sentence him to either of these punishments without the other, or to both.⁴

Every court, before whom any person shall be convicted of an offence, not punishable by death or confinement in the State prison, may, in addition to the punishment by law prescribed, require such person to recognize to the State with sufficient sureties, in a reasonable sum, to keep the peace or be of good behavior, or both, for a term not exceeding two years, and stand committed till he shall so recognize.⁵

¹R. S. ch. 167, sec. 1.

²R. S. ch. 168, sec. 1.

³R. S. ch. 167, sec. 11.

⁴R. S. ch. 168, sec. 4.

⁵Ib. sec. 5.

II. OF THE SENTENCE.

We purpose now to consider, in this connection, the degrees of punishment which may be awarded to the various offences already shown to be within the final jurisdiction of a magistrate.

Drunkenness. Any person, who shall be guilty of drunkenness, by the voluntary use of intoxicating liquor, shall, for the first offence, be punished by a fine not exceeding five dollars; and for any like offence, committed after the first conviction, shall be punished by a fine not exceeding ten dollars, or by imprisonment in the county jail or house of correction, not more than three months; but no prosecution therefor shall be commenced after three months from the commission of the offence.¹

Vagabonds and public disturbers. Any justice of the peace may commit to the house of correction, to be kept, employed and governed, according to the rules and orders thereof, all rogues, vagabonds and idle persons, going about in any town or place in the county begging, or persons using any subtile craft, juggling, or unlawful games or plays, or, for the sake of emolument, feigning to have knowledge in physiognomy, palmistry, or, for the like purpose, pretending that they can tell destinies or fortunes, or discover where lost or stolen goods may be found; common pipers, fiddlers, runaways, common drunkards, common night walkers, pilferers, persons wanton or lascivious in speech or behavior, common railers or brawlers, such as mispend what they earn, and do not provide for themselves or their families.²

Persons convicted of any of the aforesaid offences, may be committed to the house of correction for a term not exceeding thirty days.³

If any person shall ride with a naked scythe, sharpened and hung in a sneath, on the highways, or in any lanes, streets or alleys, he shall forfeit two dollars.⁴

If any persons, to the number of three or more, between sun setting and sun rising, being assembled together in any of the streets or lanes in any town, shall have any kind of imagery, or pageantry, for a public show, whether armed or disguised, or requiring or receiving money, or any thing of value on account of the same, or not, they

¹R. S. ch. 160, sec. 36.

²R. S. ch. 178, sec. 9.

³Ib. sec. 10.

⁴R. S. ch. 31, sec. 11.

shall forfeit the sum of eight dollars each, or be imprisoned for a term not exceeding one month.¹

If any person shall set fire to any pile of combustible stuff, or be in any wise concerned in causing or making a bonfire in any street or lane, or any other part of any town, such fire being within ten rods of any house or building, he shall, for each offence, forfeit the sum of eight dollars, or be imprisoned for a term not exceeding one month.²

Profanity. If any person, arrived at years of discretion, shall profanely curse or swear, upon being convicted thereof, on complaint before any justice of the peace, he shall be punished by a fine, not exceeding two dollars; and for a subsequent offence of the like kind, committed after a previous conviction, by a fine not exceeding five dollars; provided the complaint be made within twenty days after commission of the offence.³

Violation of the Lord's day, and disturbing public worship. If any person on the Lord's day, or at any other time, shall wilfully interrupt or disturb any assembly of people for religious worship, within the place of such assembly or out of it, he shall be punished by imprisonment in the county jail not more than thirty days, or by fine not exceeding ten dollars.⁴

If any person shall sell or expose to sale, within one mile from any assembly of people met for religious worship, during the time of such meeting, any refreshments or any kind of merchandise, or exhibit any shows or plays, or aid in any horse racing, gaming or other sports, whereby such meetings shall be disturbed, he shall be imprisoned in the county jail not more than thirty days, or by fine not exceeding ten dollars.⁵

If any person shall, on the Lord's day, within the walls of any house of public worship, behave rudely or indecently, he shall be punished by fine not exceeding ten dollars, or by imprisonment in the county jail not more than thirty days.⁶

If any person shall, on the Lord's day, keep open his shop, work-house, or warehouse, or travel, or do any work, labor, or business on that day, works of necessity or charity excepted, or use any sport, game or recreation, or be present at any dancing, public diversion,

¹R. S. ch. 81, sec. 12.

²Ib. sec. 13.

³R. S. ch. 160, sec. 22.

⁴Ib. sec. 23.

⁵Acts of 1848, ch. 53, sec. 1.

⁶R. S. ch. 160, sec. 25.

show or entertainment, encouraging the same, he shall be punished by a fine not exceeding ten dollars.¹

If any innholder, or other person, keeping a house of public entertainment, shall, on the Lord's day, suffer any persons, not being travelers, strangers or lodgers in such house, to abide and remain in his house, yard, orchard or field, drinking, or spending their time idly or at play, or in doing any secular business, works of necessity or charity excepted, he shall be punished by a fine, not exceeding four dollars for every person so suffered to abide and remain; and upon any subsequent conviction, he shall be punished by a fine not exceeding ten dollars for each offence; and, upon a third conviction, he shall also be incapable of holding a license; and every person so abiding, drinking, and spending his time, shall be punished by a fine, not exceeding four dollars, for each offence.²

For the purposes of the provisions of the two preceding sections, the Lord's day is construed to include the time between the midnight preceding, and the sun setting of the same day.³

If any person, on the evening preceding or following the Lord's day, shall be present at any dancing or other public diversion, except concerts of sacred music, or shall then use any sport, game or recreation, or if any innholder or keeper of a public house, shall then suffer to abide and remain in his house or places appurtenant, any persons drinking, or spending their time idly or at play, such persons, not being travelers, strangers or lodgers in such house, shall be punished by a fine not exceeding three dollars.⁴

No person, who conscientiously believes that the seventh day of the week ought to be observed as the sabbath, and actually refrains from secular labor and business on that day, is liable to the before mentioned penalties for performing secular business and labor on the Lord's day, provided he disturbs no other persons.⁵

The complaint for violations of the Lord's day must be made within six months next after the commission of the offence.⁶

Gaming. If any person shall play at cards, dice, or billiards, or with any other implements used in gaming, in any tavern or house of entertainment, or in any of the out houses, yards, gardens or appen-

¹R. S. ch. 160, sec. 26.

²R. S. ch. 160, sec. 27.

³Ib. sec. 28.

⁴Ib. sec. 29.

⁵Ib. sec. 30.

⁶Ib. sec. 31.

dages of the same, or shall, in any of the houses aforesaid, expose to view any of such implements, or shall be seen sitting at any table therein, with any of such implements before him, and shall be convicted thereof, he shall pay a fine, not less than one, nor more than ten dollars, to the use of the town where the offence was committed.¹

If any person shall, for money or other thing, play in any house, shop, or other place resorted to for the purpose of gaming, or bet on any person so playing, he shall pay a fine of not less than one dollar nor more than twenty dollars ; to be recovered on complaint before a justice of the peace, or before the district court, on indictment.²

If any person shall commit the above offence *any where*, he shall receive like punishment, except that, when it is on complaint before a justice, the fine shall not exceed ten dollars.³

Violations of the act "for the suppression of drinking houses and tippling shops." If any person, by himself, clerk, servant or agent, shall at any time sell any spirituous or intoxicating liquors, or any mixed liquors, part of which is intoxicating, in violation of law, he shall pay on the first conviction, ten dollars and the costs of prosecution, and shall stand committed until it be paid ; on the second conviction he shall pay twenty dollars and the costs of prosecution, and stand committed until it be paid ; on the third and every subsequent conviction, he shall pay twenty dollars and the costs of prosecution, and and shall be imprisoned in the common jail, not less than three months, nor more than six months ; and in default of the payment of the fines and costs prescribed for the first and second convictions, the convict shall not be entitled to the benefit of chapter one hundred and seventy five of the Revised Statutes, until he shall have been imprisoned two months ; and in default of payment of the fines and costs provided for the third and every subsequent conviction, he shall not be entitled to the benefit of said chapter one hundred and seventy-five of the Revised Statutes, until he shall have been imprisoned four months. And if any clerk, servant, agent, or other person in the employment or on the premises of another, shall violate the provisions of the law, he shall be held equally guilty with the principal, and, on conviction, shall suffer the same penalty.⁴

¹R. S. ch. 35, sec. 6.

²Ib. sec. 8.

³R. S. ch. 160, sec. 33.

⁴Act of 1851, sec. 4.

Any forfeiture or penalty arising under the preceding section, may be recovered by an action of debt, or by complaint before any justice of the peace, or judge of any municipal or police court, in the county where the offence was committed. And the forfeiture so recovered shall go to the town where the convicted party resides, for the use of the poor.¹

If any three persons, voters in the town or city where the complaint shall be made, shall, before any justice of the peace or judge of any municipal or police court, make complaint that they have reason to believe, and do believe, that spirituous or intoxicating liquors are kept or deposited, and intended for sale, by any person not authorized to sell the same, in said city or town, in any store, shop, warehouse or other building or place in said city or town, said justice or judge shall issue his warrant of search to any sheriff, city marshal or deputy, or to any constable, who shall proceed to search the premises described in said warrant; and if any spirituous or intoxicating liquors are found therein, he shall seize the same, and convey them to some proper place of security, where he shall keep them until final action is had thereon.

But no dwelling house in which, or in part of which, a shop is not kept, shall be searched, unless at least one of said complainants shall testify to some act of sale of intoxicating liquors therein, by the occupant thereof, or by his consent or permission, within at least one month of the time of making said complaint. And the owner or keeper of said liquors, seized as aforesaid, if he shall be known to the officer seizing the same, shall be summoned forthwith before the justice or judge by whose warrant the liquors were seized, and if he fails to appear, or unless he can show by positive proof, that said liquors are of foreign production, that they have been imported under the laws of the United States, and in accordance therewith, that they are contained in the original packages in which they were imported, and in quantities not less than the laws of the United States prescribe, they shall be declared forfeited, and shall be destroyed by authority of the written order to that effect of said justice or judge, and in his presence, or in the presence of some person appointed by him to witness the destruction thereof, and who shall join with the officer by whom they have been destroyed, in attesting that fact upon the back of the order, by

¹Act of 1851, sec. 5.

authority of which it was done ; and the owner or keeper of such liquors shall pay a fine of twenty dollars and costs, or stand committed for thirty days, in default of payment, if in the opinion of the court said liquors shall have been kept or deposited for the purposes of sale. And if the owner or possessor of any liquors so seized shall set up the claim that they have been regularly imported under the laws of the United States, and that they are contained in the original packages, the custom house certificates of importation and proofs of marks on the casks or packages corresponding thereto, shall not be received as evidence that the liquors contained in said packages are those actually imported therein.¹

If the owner, keeper or possessor of liquors, seized under the provisions of this act, shall be unknown to the officer seizing the same, they shall not be condemned and destroyed until they shall have been advertised, with the number and description of the packages as near as may be, for two weeks, by posting up a written description of the same in some public place, that if such liquors are actually the property of any city or town in the State, and were so at the time of the seizure, and were purchased for sale by the agent of said city or town, for medicinal and mechanical purposes only, in pursuance of the provisions of this act, they may not be destroyed ; but upon satisfactory proof of such ownership, within said two weeks, before the justice or judge by whose authority said liquors were seized, said justice or judge shall deliver to the agent of said city or town an order to the officer having said liquors in custody, whereupon said officer shall deliver them to said agent, taking his receipt therefor upon the back of said order, which shall be returned to said justice or judge.²

Nothing contained in the above act is to be construed to prevent any chemist, artist or manufacturer in whose art or trade they may be necessary, from keeping at his place of business such reasonable and proper quantity of distilled liquors as he may have occasion to use in his art or trade, but not for sale.³

It shall be the duty of any mayor, alderman, selectman, assessor, city marshal, deputy or constable, if he shall have information that any intoxicating liquors are kept or sold in any tent, shanty, hut or

¹Act of 1851, sec. 11.

²Ib. sec. 18.

³Ib. sec. 12.

place of any kind for selling refreshments in any public place on or near the ground of any cattle show, agricultural exhibition, military muster, or public occasion of any kind, to search such suspected place, and if such officer shall find upon the premises any intoxicating drinks, he shall seize them, and arrest the keeper or keepers of such place, and take them forthwith, or as soon as may be, before some justice or judge of a municipal or police court, with the liquors so found and seized; and upon proof that said liquors are intoxicating, that they were found in possession of the accused, in a tent, shanty or other place as aforesaid, he or they shall be sentenced to imprisonment in the county jail for thirty days, and the liquor so seized shall be destroyed by order of said justice or judge.¹

Larceny. Every justice of the peace, in his proper county, shall have concurrent jurisdiction of larcenies committed by stealing of the property of another, any money, goods or chattels, any writ, process or public record, any bond, bank note, promissory note, bill or exchange, or other bill, order or certificate, or any book of accounts respecting money, goods, or other things, or any deed or writing, containing a conveyance of real estate, or any valuable contract in force, or any receipt, release or defeasance, or any instrument or writing whereby any demand, right or obligation, shall be created, increased, extinguished or diminished, when the property alleged to have been stolen shall not exceed in value ten dollars.²

Receiving stolen property. Every justice has concurrent jurisdiction over the offences of buying, receiving or aiding in concealing any stolen money, goods, or other property, knowing the same to have been stolen, where the alleged value does not exceed ten dollars.³

In the above cases of larceny and receiving or concealing stolen property, the punishment is graduated as follows; for the first offence, a fine not exceeding ten dollars, and imprisonment in the county jail not more than two months; for the second offence, a fine not exceeding twenty dollars, and imprisonment in the county jail not more than six months.⁴

Embezzlement. If any officer, agent, clerk or servant of any incorporated company, or if any clerk, agent or servant of any person

¹Act of 1851. sec. 14.

²R. S. ch. 156, secs. 1, 15.

³R. S. ch. 156, secs. 10, 15.

⁴Ib. sec. 15.

or copartnership, except apprentices and other persons under the age of sixteen years, shall embezzle and fraudulently convert to his own use, or shall take and secrete, with intent to convert to his own use, without the consent of his employer or master, any money or property of another, which shall have come to his possession, or shall be under his care by virtue of such employment, he shall be deemed, by so doing, to have committed larceny, and shall be punished accordingly.¹

By carriers and others. If any carrier or other person, to whom any money, goods, or other property, which may be the subject of larceny, shall have been delivered to be carried for hire, or if any other person, who shall be intrusted with such property, shall embezzle or fraudulently convert to his own use, any such money, goods, or other property, either in the mass, as the same were delivered, or otherwise, and before the same shall be delivered at the place, or to the person where and to whom, they were to be delivered, he shall be deemed, by so doing, to have committed larceny, and be punished accordingly.²

Malicious injuries and wilful trespasses. Justices of the peace have jurisdiction of the following offences, where the property destroyed or the injury occasioned by the trespass, shall not be alleged to exceed the sum of ten dollars, in which case the punishment shall be by fine not exceeding ten dollars, or imprisonment in the county jail not more than thirty days :³

1. Any person who shall maliciously or wantonly, cut down or destroy, or, by topping, girdling, or otherwise, injure any fruit tree, or other tree or shrub, not his own, standing or growing for ornament or use ;⁴ or

2. Maliciously or wantonly break down, mar, deface or injure any fence, belonging to or enclosing lands not his own, or throw down or open any gate or bars, not his own, and leave the same down or open ;⁵ or

3. Maliciously or wantonly injure, destroy, or sever from the land of another, any produce thereof, or any thing attached thereto ;⁶ or

4. Wilfully and maliciously take down, injure or remove any monument erected, or any tree marked as a boundary of any tract of

¹R. S. ch. 156, sec. 6.

²Ib. sec. 7.

³R. S. ch. 162, sec. 15.

⁴Ib. sec. 5.

⁵Ib. sec. 6.

⁶Ib. sec. 7.

land or of any town, or shall destroy, deface, or alter the marks of any such monument or tree, made for the purpose of designating such boundary, or injure or deface any milestone or guide-board, erected on any public way, turnpike, or railroad, or shall maliciously or wantonly remove, deface, or injure any sign board, or break, or remove any lamp, or lamp-post, or extinguish any lamp on any bridge, street, way, or passage ;¹ or

5. Wilfully commit any trespass, by cutting down or destroying any timber or wood, standing or growing on the land of another, or by carrying away any kind of timber and wood, being on such land, or by digging up or carrying away any earth or stone, or by taking and carrying away from such land any grass, hay, corn, grain, fruit, or other vegetables, or carrying away from any wharf or landing place any goods whatever, in which he has no interest ;² or

6. Wilfully commit any trespass by entering upon the garden, orchard, or improved land of another, with intent to take, carry away, destroy or injure the trees, shrubs, grain, grass, hay, fruit, or vegetables there being ;³ or

7. Wilfully enter, pass over, or through any garden, yard, or other improved field, after having been expressly forbidden so to do by the owner or occupant ;⁴ or

8. Wilfully or maliciously injure, destroy, or deface any building or fixture attached thereto, not having the consent of the owner thereof, or destroy, injure or secrete any goods or chattels, or valuable papers of another.⁵

Fireworks. If any person sell, offer for sale or give away any fireworks, such as crackers, squibs, or rockets, or shall set fire to, or throw the same in any town or city, without license, he shall be punished by a fine not exceeding ten dollars.⁶

Breaches of the peace. Every justice of the peace may punish by fine, not exceeding ten dollars, all assaults and batteries, and other breaches of the peace, declared criminal by any statute or town by-law when the offence is not of a high and aggravated nature.⁷

Shows. If any person shall, for money or other valuable article,

¹R. S. ch. 162, sec. 8.

²Ib. sec. 9.

³Ib. sec. 11.

⁴Ib. sec. 12.

⁵Ib. sec. 13.

⁶R. S. ch. 163, sec. 2.

⁷R. S. ch. 170, sec. 2.

exhibit any images or pageantry, sleight of hand tricks, puppet show or circus, or any feats of balancing, wire-dancing, personal agility, sleight or dexterity, or theatrical performances, without a license, he shall pay, for every such offence, a sum not exceeding one hundred dollars nor less than ten dollars.¹

Violating city ordinances. Cities have power to establish from time to time all such rules and orders as the municipal government of such cities may deem necessary and expedient, for the due regulation, in such cities, of omnibusses, stages, hackney-coaches, wagons, carts, drays, hand-carts and all other vehicles, whatever, used and employed wholly or in part in said cities, whethe by establishing their rates of fare, prescribing their routes and places of standing, or in any other manner whatever, and whether such vehicles are used for business or pleasure, or the conveyance of passengers or freight, and whether by horse power or otherwise.²

Such cities may annex penalties for the breach of any of the ordinances, rules and orders, provided for in the preceding section, not to exceed twenty dollars for any one offence, which penalties may be recovered, for the use of said cities, by complaint before the municipal courts of said cities, or any justice of the peace, where no such court is established.³

Truant children. Any town is authorized to make all needful provisions and arrangements concerning habitual truants, and children between the ages of six and fifteen years, not attending school, without any regular and lawful occupation, and growing up in ignorance; and may also make all such ordinances and by-laws respecting such children as shall be most conducive to their welfare, and the good order of such town; and there shall be annexed to such ordinances, suitable penalties, not exceeding for any one breach, a fine of twenty dollars: *provided*, that said ordinances and by-laws shall be approved by the district court for the district, and shall not be repugnant to the laws of the State.⁴

The several towns availing themselves of the provisions of the preceding section, must appoint, at their annual meeting, three or more persons, who alone shall be authorized to make the complaints, in every

¹Act of 1847.

²Act of 1860.

³Ib.

⁴Act of 1860, ch. 198, Art. 1, sec. 14.

case of violation of said ordinances or by-laws, to the justice of the peace, or other judicial officer, who by said ordinances shall have jurisdiction in the matter, which persons, thus appointed, shall alone have authority to carry into execution the judgments of said justices of the peace or other judicial officers.¹

The justices of the peace, or other judicial officers, in all cases, at their discretion, in place of the fine, are authorized to order children, proved before them to be growing up in truancy, and without the benefit of the education provided for them by law, to be placed for such periods of time as they may judge expedient, in such institution of instruction or house of reformation, or other suitable situation, as may be provided for the purpose²

Disturbing schools. If any person, whether he be a scholar or not, shall enter any school house or other place of instruction, during or out of school hours, the teacher or any of the pupils being therein, and shall wilfully interrupt or disturb the teacher or pupils by loud speaking, rude or indecent behavior, signs or gestures; or if any person shall wilfully interrupt a school by prowling about the building, by making noises, or by throwing missiles at the school house, or in any wise disturbing the school, he shall pay a fine of not less than two, nor more than twenty dollars, to be recovered by complaint before any justice of the peace, or by indictment and conviction in the district court.³

III. OF APPEALS AND RECOGNIZANCES.

Any person aggrieved at the sentence of any justice of the peace or judge of a municipal or police court, may appeal therefrom to the next district court, to be holden in the same county; and the justice or judge shall grant the appeal, and order him to recognize in a reasonable sum, not less than twenty dollars, with sufficient sureties, for his appearance, and for prosecuting his appeal; and he shall stand committed till the order is complied with.⁴

He shall be held to produce a copy of the whole process, and of all writings filed before the justice, at the district court.⁵

Any person aggrieved by the order of any judge of a municipal or

¹Act of 1850, ch. 193, Art. 1, sec. 15.

⁴R. S. ch. 170, sec. 8.

²Ib. sec. 16.

⁵Ib. sec. 9.

³Ib. Art. 10, sec. 18.

police court, or justice of the peace, in requiring him to recognize with sureties for keeping the peace, may, on giving the security required, appeal to the next district court in the same county.¹

When an appeal is so taken, the magistrate shall require such witnesses as he may think necessary, to recognize for their appearance at the court appealed to.²

The provisions for appeal in the act passed by the legislature of eighteen hundred and fifty one, entitled "An act for the suppression of drinking houses and tippling shops," are as follows :

If any person, by himself, clerk, servant or agent, shall be convicted of selling any spirituous or intoxicating liquors, or any mixed liquors, part of which is intoxicating, in violation of law, and shall claim an appeal, he shall, before the appeal shall be allowed, recognize in the sum of one hundred dollars, with two good and sufficient sureties, in every case so appealed, to prosecute his appeal, and to pay all costs, fines and penalties that may be awarded against him, upon a final disposition of such suit or complaint. And before his appeal shall be allowed, he shall also, in every case, give a bond with two good and sufficient sureties, running to the town or city where the offence was committed, in the sum of two hundred dollars, that he will not, during the pendency of such appeal, violate any of the provisions of the act. And no recognizance or bond shall be taken in cases arising under the act, except by the justice or judge before whom the trial was had. The forfeiture for all bonds and recognizances, given in pursuance of this act, shall go to the town or city where the offence was committed, for the use of the poor; and if the recognizances and bonds mentioned in this section shall not be given within twenty-four hours after the judgment, the appeal shall not be allowed; the defendant in the mean time to stand committed.³

If any person claiming any liquors, seized under this law, shall appeal from the judgment of any justice or judge by whose authority the seizure was made, to the district court, before his appeal shall be allowed, he shall give a bond in the sum of two hundred dollars, with two good and sufficient sureties, to prosecute his appeal, and to pay all fines and costs which may be awarded against him.⁴

¹R. S. ch. 169, sec. 10.

²Ib. sec. 11.

³Act of 1851.

⁴Ib.

It shall be the duty of any mayor, alderman, selectman, assessor, city marshal or deputy or constable, if he shall have information that any intoxicating liquors are kept or sold in any tent, shanty, hut or place of any kind for selling refreshments in any public place on or near the ground of any cattle show, agricultural exhibition, military muster, or public occasion of any kind, to search such suspected place, and if such officer shall find upon the premises any intoxicating drinks, he shall seize them, and arrest the keeper or keepers of such place, and take them forthwith, or as soon as may be, before some justice or judge of a municipal or police court, with the liquors so found and seized; and upon proof that said liquors are intoxicating, that they were found in possession of the accused, in a tent, shanty or other place as aforesaid, he or they shall be sentenced to imprisonment in the county jail for thirty days, and the liquor so seized shall be destroyed by order of said justice or judge.¹

If any person arrested and sentenced as aforesaid, shall claim an appeal, before his appeal shall be allowed, he shall give a bond in the sum of one hundred dollars, with two good and sufficient sureties, that he will prosecute his appeal and pay all fines, costs and penalties which may be awarded against him.²

In this State the right of appeal, both in criminal and civil cases, when it exists at all, is given and regulated by statute. In prosecuting an appeal, certain things are to be done by the court appealed from, and certain things by the court appealed to, and the same law regulates both. And when rightly understood and applied, if it requires the one to receive, it requires the other to allow the appeal.³

If an appeal is well taken and prosecuted, it vacates and supersedes the judgment appealed from, and places the case within the jurisdiction of the appellate court, to be proceeded in almost, if not entirely, in the same manner as if it were an original proceeding in the appellate court. But if the appeal is not well taken and prosecuted, if it is not in a case allowed by law, or if allowed upon terms and conditions preby law, and these are not complied with, the proscribed ceeding itself is nugatory and void, and stands wholly unaffected by such claim of appeal.⁴

¹Act of 1851.

²Ib.

³22 Pick. 12.

⁴Ib.

The court appealed to, and not the court appealed from, is to judge, in the last resort, whether the party had a right of appeal or not. This obviously results from the relation which these courts, acting under one and the same system of laws, bear to each other, and is necessary to prevent the appellate court from being ousted of its jurisdiction, in a case where the law intended to confer it. If, therefore, the court appealed from, through mistake of the law, or otherwise, declines or refuses to allow an appeal, when the appellant is by law entitled to it, and this is made to appear to the appellate court, they will entertain the appeal, notwithstanding such disallowance, and the judgment of the lower court will be thereby vacated.¹

So, on the other hand, if the court below allow the appeal, where by law it ought not to be allowed, the appellate court will dismiss the appeal.²

No time is fixed within which the security shall be furnished, but the appeal is made to "the district court next to be held in the same county;" and therefore it must follow that the sureties should appear and recognize before that time.

The appeal is from the conviction, not from the sentence. And the provision that the party shall be in custody until he recognize, or be sentenced, carries a manifest implication, that he is to be sentenced in default of a recognizance.³

When the magistrate finds the defendant guilty of the offence, and an appeal is claimed, he shall be required to recognize as herein before provided.

If the sureties are in court, and the magistrate is satisfied of their responsibility, the recognizance may at once be taken, the cosurers acknowledging themselves indebted to the State in a sum not excessive, conditioned that if the defendant appears at the appellate court and prosecutes his appeal, and abides the sentence of court thereon, and in the meantime keeps the peace, and is of good behavior, and complies with such other provisions as the law requires, which will be found in the forms at the close, then the recognizance shall be void.

If the sureties be not in court, the statute requires that the magistrate should commit the appellant to abide the sentence of court

¹22 Pick. 12.

²16 Pick. 11.

³Ib.

until such recognizance be entered into. For this purpose the magistrate should make out a mittimus, reciting every thing necessary to show his authority to issue it, and requiring the officer to commit, and the jailor to receive the prisoner, and keep him till such sureties are furnished, or he be discharged by order of law.

The recognizance, when taken, should state in substance all the proceedings which show the authority of the magistrate to take it.

CHAPTER VI.

OF BAIL AND RECOGNIZING WITNESSES.

THE subject of bail has been partially considered in the chapter next preceding. In this chapter we propose briefly to examine,

1st. When and by whom bail should be taken.

2d. How it should be taken, and the amount to be required.

3d. The disposition to be made of the recognizance after it is taken.

We shall also speak of recognizing witnesses, and the duties of a magistrate thereon.

I. WHEN AND BY WHOM BAIL SHOULD BE TAKEN.

Bail is a delivery of a person to his sureties, upon their giving, together with himself, sufficient security for his appearance, he being supposed to continue in their friendly custody, instead of going to prison.¹

What are bailable offences, and of witnesses recognizing. If it shall appear to the justice, on examination of the accused, that an offence has been committed, and that there is probable cause to believe the prisoner to be guilty, and if the offence be bailable by such magistrate, and sufficient bail be offered, it shall be taken, and the prisoner discharged; but if the offence is not bailable by the magistrate, or no sufficient bail be offered, the prisoner shall be committed to prison to await a trial.²

Whether the prisoner be admitted to bail or committed, the justice shall order such of the witnesses against the prisoner as he may deem material, to recognize to appear and testify at the next court having cognizance of the offence, and in which the prisoner shall be held to answer.³

When the magistrate shall be satisfied there is good cause to believe that any such witness will avoid and not perform the condition of his own recognizance, unless other security be given, he may order such

¹Chitty's Cr. L. 93—Davis's Just. 123. ²Ib. sec. 18.

³R. S. ch. 171, sec. 17.

witness to recognize, with surety or sureties, for his appearance at court.¹

When any such witness shall refuse to recognize, with or without surety, as required, he may be committed to prison to remain till by law discharged.²

Any person may recognize for the appearance at court, as a witness, of a married woman or a minor, or the justice may, in his discretion, recognize such married woman or minor, in a sum not exceeding twenty dollars; which shall be valid, notwithstanding the disability of coverture or minority.³

Any two justices of the peace and quorum for any county, on application of any prisoner committed for a bailable offence, or for not finding sureties to recognize for him, may inquire into the case, and admit such prisoner to bail; subject however, to the exceptions mentioned at page 163 of this volume.⁴

If the party, for whom a writ of habeas corpus is sued out, is imprisoned and detained for any offence which is bailable, he shall be admitted to bail, if sufficient bail be offered; and if not, he shall be remanded, with an order of the court or justice, expressing the sum in which he shall be held to bail, and the court at which he shall be bound to appear; and any justice of the peace may, at any time before the sitting of the court, bail the party pursuant to such order.⁵

Where the offence charged in the warrant is not punishable with death or imprisonment in the State prison, the person arrested, if he shall request it, may be carried before any justice of the county in which the arrest was made, for the purpose of entering into a recognizance, without any trial or examination, and it shall be the duty of the officer so to carry him; and the justice may take a recognizance from the person arrested, with sufficient sureties, for his appearance at the next court, or before any justice of the peace having cognizance of the offence in the county where the same is alleged to have been committed; and thereupon the party arrested shall be discharged.⁶

The magistrate having so taken the recognizance of the party charged, shall certify that fact on the warrant, and deliver the same with the recognizance, to the person who made the arrest; and it

¹R. S. ch. 171, sec. 19.

²Ib. sec. 20.

³Ib. sec. 21.

⁴Ib. sec. 22.

⁵R. S. ch. 140, sec. 17.

⁶R. S. ch. 171, sec. 4.

shall be his duty to cause the same to be delivered, without delay, to the clerk of the court before which the person accused was recognized to appear.¹

If the magistrate, in the county where the arrest was made, shall refuse to let to bail the person arrested and brought before him, or if no sufficient bail be offered, the person having him in charge shall take him before some magistrate of the county in which the warrant was issued, to be proceeded with as hereinafter mentioned.²

When the offence charged is punishable with death, or by imprisonment in the State prison, the officer making the arrest in some other county, shall convey the prisoner to the county where the warrant was issued, and he shall be proceeded with in the manner directed in the following section.³

Every person, arrested by warrant for any offence, where no provision is made for his examination thereon before any other justice of the peace, shall be brought before the magistrate who issued the warrant ; or if he be absent or unable to attend, before any other magistrate of the same county ; and the warrant with proper return thereon, signed by the person who made the arrest, shall be delivered to the magistrate.⁴

Any magistrate may adjourn an examination before himself, from time to time, not exceeding ten days at one time, and may take the recognizance of the party accused, with sufficient sureties, for his personal attendance for the purpose, before such magistrate ; but if the party is charged with a capital offence, he shall be committed to prison in the mean time.⁵

If the party, so recognized, shall not appear at any time appointed before the magistrate, for further examination, the magistrate shall record the default, and certify his recognizance, with the record of the default, to the district court ; and the like proceedings shall be had thereon, as on a breach of the condition of a recognizance for appearance before the court.⁶

When such person shall fail to recognize, he may be committed to prison by an order from the magistrate, stating, in a summary manner, the offence for which he is charged, and that he committed him for

¹R. S. ch. 171, sec. 5.

²Ib. sec. 6.

³Ib. sec. 7.

⁴Ib. sec. 8.

⁵Ib. sec. 9.

⁶Ib. sec. 10.

further examination on a future day, named in such order ; and on the day appointed he may be brought before the magistrate, by his verbal order to the same officer by whom he was committed, or by a written order to a different person.¹

If, upon the examination of the person charged with any offence committed in any other State or territory, and liable by the constitution and laws of the United States to be delivered over upon the demand of the executive of such other State or territory, it shall appear to the court or magistrate that there is reasonable cause to believe that the complaint is true, and that such person may be lawfully demanded of the executive, he shall, if charged with an offence bailable by the laws of this State, be required to recognize, with sufficient sureties, to appear before such court or magistrate at a future day, allowing a reasonable time to obtain the warrant of the executive, and to abide the order of the court or magistrate ; and if such person shall not so recognize, he shall be committed to prison, and be there detained until such day, in like manner as if the offence charged had been committed within this State ; and if the person so recognizing shall fail to appear, according to the condition of his recognizance, he shall be defaulted, and the like proceedings shall be had, as in the case of other recognizances entered into before such court or magistrate ; but if such person be charged with an offence not bailable by the laws of this State, he shall be committed to prison, and there detained until the day so appointed for his appearance before the court or magistrate.²

If the person, so recognized or committed, shall appear before the court or magistrate, upon the day ordered, he shall be discharged, unless he shall be demanded by some person authorized by the warrant of the executive to receive him, or unless the court or magistrate shall see cause to commit him, or to require him to recognize anew, for his appearance at some other day ; and if, when ordered, he shall not so recognize, he shall be committed and detained as before ; *provided*, that whether the person so charged shall be recognized, committed or discharged, any person, authorized by the warrant of the executive, may at all times take him into custody ; and the same shall be a discharge of the recognizance, if any, and shall not be deemed an escape.³

¹R. S. ch. 171, sec. 11.

²Ib. sec. 4.

³Act of 1847, ch. 193, sec. 2.

The foregoing are the various statute provisions on this subject. It will be seen that a magistrate may be called upon to take recognizances in criminal proceedings in the following cases. 1. The recognizance of a party appealing from his decision in a matter within his jurisdiction; 2. The recognizance binding a party over, where the alleged offence is not one within his final jurisdiction; 3. The recognizance for the future appearance of a party for further examination; 4. Admitting prisoners to bail, where the proceedings are not had before himself; 5. Recognizing witnesses; 6. Recognizing persons accused of offences committed in other States; 7. He has the further authority to require sureties for keeping the peace, and for good behavior, in which case the obligation should be entered into by a recognizance.

The duties of a magistrate in the first and fifth cases above enumerated have already been sufficiently considered. The remarks which follow in this division of the present chapter apply more particularly to the second, third and fourth divisions; admitting prisoners to bail, where the offence is one beyond the final jurisdiction of a justice of the peace, and requiring sureties for the future appearance of a party for further examination.

No person before conviction is bailable for any of the crimes, which have been denominated capital offences, since the adoption of the constitution, where the proof is evident and the presumption great, whatever the punishment of the crimes may be.¹ All other offences are bailable.

A justice of the peace has no authority to bail an offender, who has absconded after conviction and before sentence, and who has been apprehended upon a new warrant during the vacation, although the offence for which he was originally committed was bailable. This point was decided upon demurrer, by the supreme court of Massachusetts. The case was, one Otis was bound over upon a charge of forgery, which, by the laws of that State, is a bailable offence. He was tried and convicted; but before sentence was passed upon him he absconded and forfeited his recognizance. Several years afterwards he was brought back into that State by virtue of a warrant from the supreme executive, as a fugitive from justice. He was carried before a magistrate, who admitted him to bail, and he was recognized anew to

¹ Const. of Maine, Amend. Art. 2.

appear at the next term of the court in which his conviction was had, to receive sentence. He did not appear ; and upon a *scire facias* to recover the penalty of the recognizance, and demurrer to it, the court decided that the magistrate had no authority in such a case to admit him to bail ; but that it was his duty to commit him, where he would remain in custody until the next term of the court, when and where he would regularly receive his sentence.¹

II. HOW BAIL SHOULD BE TAKEN, AND THE AMOUNT TO BE REQUIRED.

Bail in criminal proceedings is taken by a recognizance, which is an obligation of record, entered into before a magistrate duly authorized for that purpose, conditioned to prosecute an appeal, or to appear for further examination, or to appear at a higher court, as the case may be. The party need not sign the recognizance, but the record thereof is made out by the justice who takes it, and is subscribed by him. It is a matter of record as soon as taken, though not made up at once, but only entered in his book.²

A recognizance is taken verbally. The party appears before the magistrate with his sureties, if any are required, and acknowledges himself to be bound to the State in such sum as may be required, with such conditions as the provisions of the statute may demand. The amount of the bail is a matter entirely within the discretion of the court. It is provided by the constitution of the United States, that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.³

The constitution of Maine makes similar provisions.⁴

But while the magistrate should studiously avoid requiring an amount at least looking oppressive upon the prisoner, he should equally remember that the State has also rights, which he is commissioned to enforce.

A magistrate has not only no right to refuse to take bail, but he has no right to delay taking it. And such delay is an offence at the common law, against the liberty of the subject, and for which the magistrate is liable in damages to the party injured.⁵

He should look well to the means and character of the sureties to

¹19 Pick. 140-141.

²Chitty's Cr. L. 90.

³Const. U. S. Amend. Art. 8.

⁴Const. Maine, Art. 1, sec. 9.

⁵Davis's Just. 123.

be required. They should be sureties in fact, and not mere men of straw ; and if the justice is not satisfied as to their ability to meet the proposed liability to the fullest extent, or if he is ignorant of the persons offered, it is his duty to inquire into the pecuniary condition of the sureties offered, and, if necessary, examine the sureties themselves. It is said that if, after inquiry by a magistrate upon the oath of the sureties, he finds he has been deceived, he may require fresh and better sureties, and may commit the party on his refusal ; for that insufficient sureties are no sureties.

An attorney is not prohibited from being surety for his client in a criminal case. A married woman cannot be bound by recognizance, except as a witness,¹ because the recognizance is not capable of being estreated. A minor cannot be accepted as a surety, with the above exception,² or enter into a recognizance as principal, because he cannot bind himself during his minority.

Where, however, such persons are witnesses, it is specially provided that any person may recognize for their appearance, or the magistrate may, in his discretion, recognize such married person or minor, in a sum not exceeding twenty dollars, which shall be valid, notwithstanding the disability of coverture or minority.³

The recognizance itself should in all cases show, in the condition, the cause of taking it.⁴ The principle that every thing necessary to give jurisdiction to an inferior magistrate should appear on the face of the proceedings, has been often commented upon. It is important that it should be borne in mind in all acts of official duty.

It is not sufficient, that the recognizance mentions generally the crime of which the prisoner is accused. It should mention the particular crime for which he is bound over to take his trial. Thus, if he is to be tried for larceny, it is said that it ought to be so specially stated in the condition of the recognizance ; and the name of the person upon whose complaint he is charged, ought also to be mentioned in the recognizance.

III. THE DISPOSITION TO BE MADE OF THE RECOGNIZANCE AFTER IT IS TAKEN.

Appeals. The person appealing shall produce a copy of the whole process, and of all writings filed before the justice, at the district court.⁵

¹R. S. ch. 171, sec. 21.

²Ib.

³Ib.

⁴4 Mass. 643—9 Mass. 520—16 Mass. 447—2 Green. on Ev. 62.

⁵R. S. ch. 170, sec. 9.

Binding over. All examinations and recognizances, taken by a magistrate, pursuant to the provisions of the one hundred and seventy-first chapter of the Revised Statutes, shall be certified and returned to the county attorney, or clerk of the court before which the party charged is bound to appear, on or before the first day of its session; and in case of neglect of such justice, he may be compelled, by rule of court, and, if it be disobeyed, by attachment for contempt.¹

Recognizance for further examination. If the person recognized for further examination, shall not appear at any time appointed before the magistrate for further examination, the magistrate shall record the default, and certify his recognizance, with the record of the default, to the district court; and the like proceedings shall be had thereon, as on a breach of the condition of a recognizance for appearance before the court.²

Recognizance where the proceedings are not had before the magistrate taking the recognizance. The proper course to be pursued in such cases seems to be well settled and distinctly marked out, in several cases in the reports. The case of *Johnson vs. Randall*,³ decided in Massachusetts, assumes the rule to be, that justices of the peace, taking recognizance for the appearance of the party at another tribunal, must return them to the court where the principal recognizor is to appear, and, if defaulted there, by reason of non-appearance before such tribunal, that court, in case it has not jurisdiction to issue scire facias, and render judgment thereon, to such other court as has further jurisdiction thereon.

Recognizances of witnesses. These are to be returned to the same court at which the witnesses are bound to appear.⁴

Recognizances for keeping the peace, and for good behavior. Every recognizance for keeping the peace and for good behavior, shall be transmitted to the district court, on or before the first day of the next ensuing term, and shall there be filed by the clerk, as of record.⁵

¹R. S. ch. 171, sec. 24.

²Ib. sec. 10.

³7 Mass. 340.

⁴R. S. ch. 171, sec. 24.

⁵R. S. ch. 169, sec. 14.

CHAPTER VII.

OF THE COMMITMENT.

THE order for the commitment is analagous to the execution in civil proceedings, and is termed a *mittimus*. In treating of this subject we shall consider—

I. IN WHAT CASES A COMMITMENT MAY BE ORDERED.

At the risk of retracing ground already travelled over, we shall recapitulate, in this connection, the several classes of cases in which it is the duty of a magistrate to order commitments in criminal proceedings.

It has already been seen that, where an offender is convicted before a justice of the peace of an offence within his final jurisdiction, or pleads guilty to the charge, unless the party takes an appeal, it becomes the duty of the magistrate to award the sentence the law provides for the offence. When this is done, if a commitment be ordered, he issues his *mittimus*, commanding the officers, to whom it is directed, to carry into effect the judgment which he has ordered.

It has also been seen that if the offence is not one within his final jurisdiction, and is not bailable, or, if bailable, bail is not furnished, it is then his duty to commit.

A *mittimus* may also be issued for the commitment of witnesses refusing to recognize.

Parties required to recognize with sureties to keep the peace, may be committed if they refuse to comply with the order.

II. TO WHAT PLACE THE PARTY SHALL BE COMMITTED.

The statute expressly provides, in regard to certain offences, that the person offending shall, on conviction, be committed to the house of correction for the county.¹

There shall be erected, or otherwise provided by the county commissioners, in every county within this State, at the charge of such

¹R. S. ch. 178, sec. 9.

county, a fit and convenient house or houses of correction, with convenient accommodations, to be used and employed for the keeping, correcting, and setting to work of rogues, vagabonds, common beggars, idlers and disorderly persons, and all other offenders who may be committed thereto, in due course of law.¹

No convict shall be sentenced to the State prison for a less term than one year; all imprisonments for a less term shall be in the county jail or house of correction.²

The sheriff of each county has the custody and charge of the jail or jails therein, and must keep the same personally or by deputy.³

The jails are to be used—

First, for the detention of persons charged with offences, and duly committed for trial;

Secondly, for the detention of persons who may be duly committed to secure their attendance as witnesses, on the trial of any criminal cause;

Thirdly, for the confinement of persons committed pursuant to a sentence, upon conviction for an offence, and of all other persons duly committed for any cause authorized by law;

Fourthly, for the detention of prisoners committed under the authority of the United States.

Where the prisoner is arrested in a different county from that in which the offence was committed, and is taken before a magistrate in the county where the arrest was made, for the purpose of being let to bail, and bail is refused, or no sufficient bail be offered, the magistrate has no authority to order a commitment; but the person having him in charge must take him before some magistrate of the county in which the warrant was issued.⁴

III. THE REQUISITES OF A MITTIMUS.

It has been said that a commitment need not be drawn with the same precision as an indictment; yet it has also been said by eminent authority, that it is very important that it should be framed with accuracy, or the party may, though prosecuted for a felony, be discharged out of custody, or if he escapes, the officer may not be punishable.

¹R. S. ch. 178, sec. 1.

²R. S. ch. 167, sec. 11.

³R. S. ch. 104, sec. 23.

⁴R. S. ch. 171, sec. 6.

The requisites of a commitment may be stated as follows :

1. Every final commitment must be in writing, under the hand and seal, and show the authority of the magistrate, and the time and place of making it. A magistrate, however, may by parol order a party to be detained a reasonable time, till he can draw out a formal commitment. Every mittimus should recite the cause of complaint on which it is founded.¹

2. It should be made in the name of the State, being signed by the justice as a magistrate, holding a commission under the authority thereof.

3. The direction is double ; first to the sheriff, or his deputies, or to any constable of such towns as may be, commanding them to take the body of the party, and forthwith to carry and deliver the same to the keeper of the prison ; and to the latter, commanding him to receive the same, and safely to keep him till duly discharged.

4. It should describe the prisoner by his name and surname, if known ; and if not known, then it may suffice to describe the person by his age, stature, complexion, color or hair, and the like, and to add that he refuses to tell his name.

5. It is necessary to set forth the particular species of crime alleged against the party, with convenient certainty. The reasons given for this are, to be able to hold the sheriff liable for an escape, that jailers may have the means of making proper returns, and because the court, before whom the prisoner is removed by habeas corpus, ought to discharge or bail him.

6. The mittimus should point out the place of imprisonment, and not merely direct that the party should be taken to prison.

7. With respect to the *time* and *mode* of imprisonment, it may be observed that the commitment should have an apt conclusion, such as, to detain the party "until he shall be discharged by due course of law." These words alone are proper where the party is committed for an offence not bailable ; but where he is committed for want of sureties, it is usual to direct the jailer to keep the prisoner "in his said custody for want of sureties, or until he shall be discharged by due course of law." But where the commitment is in the nature of punishment, the time of imprisonment must be stated.

¹4 Mass. 495.

CHAPTER VIII.

OF THE FEES OF THE JUSTICE AND TAXATION OF COSTS.

I. OF THE FEES OF THE JUSTICE.

THESE are regulated by statute, and are as follows :

Receiving a complaint, and issuing a warrant in criminal cases, fifty cents.¹

Entering a complaint in a criminal prosecution, swearing witnesses, rendering judgment and recording the same, examining, allowing and taxing the costs and filing the papers, seventy-five cents.²

For every subpoena for one or more witnesses, ten cents.³

For a mittimus for the commitment of any person on a criminal accusation, twenty-five cents.⁴

For travel, in the performance of any official duty, at the rate of fifty cents for every ten miles, in going and returning.⁵

One travel only being allowed for returning papers to court at the same term.⁶

And in all cases, where the attendance of two or more justices is required, each of them shall be entitled to the fees prescribed for all services rendered by him personally.⁷

For administering an oath, in all cases, except on a trial or examination before himself, and a certificate thereof, whether administered to one or to more persons, at the same time, twenty cents.⁸

For a copy of a record, or other paper, at the rate of twelve cents a page.⁹

Recognizing persons charged with crimes, for their appearance at the supreme or district court, and for certifying or returning the same, with or without sureties, twenty-five cents, to be paid by the person so recognizing.¹⁰

¹R. S. ch. 151, sec. 1.

²Ib.

³Ib.

⁴Ib..

⁵Ib.

⁶Ib.

⁷Ib.

⁸Ib.

⁹Ib.

¹⁰Ib.

For the trial of an issue, eighty cents.¹

For a recognizance to prosecute an appeal, including principal and surety, twenty cents.²

Except when otherwise expressly provided, the fees of the judge of any municipal or police court, whether in civil or criminal proceedings, must be taxed in the same manner, and at the same rate, as the fees of justices of the peace.³

For further particulars relative to the subject of justices' fees, the reader is referred to page 83, of this volume.

II. OF THE TAXATION OF COSTS.

Where several warrants are issued by any justice of the peace, against one or more defendants, when only one warrant is necessary, no more costs shall be allowed therefor to the justice, than for one complaint and warrant.⁴

When a party, accused before a justice, has been ordered to recognize to answer before any court, having jurisdiction of the offence, and the grand jury on examination of the evidence before them, shall not find an indictment against such party, the justice will not be entitled to any fees for his services in the case.⁵

In no case can a justice tax other or greater fees than are expressly allowed by law.⁶

Justices, before whom any criminal prosecution may be pending, cannot allow any charge for aid, or other expenses of the officer, in serving the warrant in such case, other than the stated fees for the officer's service and travel, unless, after examination of the officer under oath, and on such other testimony as they shall think proper, they find reasonable cause to justify such additional charges.⁷

When a justice shall issue any summons for a witness, at the request of any person prosecuted in a criminal suit, it shall be so expressed in the summons; and the witness shall thereby be required to appear and give evidence, upon condition that such party pay him his legal fees.⁸

No costs shall be allowed by a justice for the benefit of any complainant, whether as an officer, witness, or in any other capacity;

¹R. S. ch. 151, sec. 1.

²Ib.

³Ib. sec. 2.

⁴R. S. ch. 152, sec. 1.

⁵Ib. sec. 2.

⁶Ib.

⁷Ib. sec. 3.

⁸Ib. sec. 6.

provided that a police officer or constable duly qualified, and acting under the authority of a town, or complaining in cases where, by particular authority of law, it is made his duty to complain, may be allowed his fees as an officer.¹

When any person shall have been summoned as a witness in more than one criminal prosecution before a justice of the peace, on the same day, he shall be allowed pay for travel and attendance, only in such one prosecution as the justice may direct; and in no case shall he be allowed more than one travel at the same time.²

If any person, convicted of any offence before any justice of the peace, be ordered to pay the costs of prosecution as part of his sentence, and shall comply with such order, the justice may retain his own fees, and pay over the other fees to the officer, witnesses and other persons thereto entitled.³

If such fees, other than the justice's, be not called for within one year, they shall be forfeited to the use of the State, and the justice shall pay over the same to the county treasurer, within such time and under such penalty, as the statute provides.⁴

Whenever a party accused shall be acquitted by any justice of the peace; or, being convicted, shall not be sentenced to pay costs; or, being sentenced to pay costs, shall not pay them; the county commissioners may examine and correct all such bills of costs, and order the same paid out of the county treasury;⁵ except that, whenever any justice, or any individual interested in the bill of costs, shall be one of the commissioners, the district court held in the same county shall have exclusive cognizance of the matter.⁶

In all criminal prosecutions, which are carried up by appeal from the decision of a justice, or where the party accused is committed or required to recognize for his appearance to any court, the costs shall be taxed and certified, with the papers to the court.⁷

If the justice, upon examination of one complained against for the purpose of having sureties of the peace, shall not be satisfied that there is just cause to fear the commission of any such offence, he shall immediately discharge the party complained of; and if the magistrate shall

¹R. S. ch. 152, sec. 7.

²Ib. sec. 8.

³Ib. sec. 10.

⁴Ib. sec. 11.

⁵R. S. ch. 152, sec. 1.

⁶Ib. sec. 13.

⁷Ib. sec. 14.

judge the complaint unfounded, malicious or frivolous, he may order the complainant to pay the costs of prosecution, who shall thereupon be answerable to the magistrate and officer for their fees as for his own debt.¹

When the person complained of is required to give security for the peace, or for his good behavior, the court or magistrate may further order that the costs of prosecution, or any part thereof, shall be paid by such person, who shall stand committed until such costs are paid, or he is otherwise legally discharged.²

The complainant, against one accused of having committed a crime in another State, shall be answerable for all the actual costs and charges, and for the support in prison of any person so committed, to be paid in the same manner as by a creditor for his debtor committed on execution, and if the charge for his support in prison shall not be so paid, the jailor may discharge such person, in like manner as if he had been committed on an execution.³

The fees to be taxed in a criminal process, before a justice of the peace, are—1st. Those of the justice; 2d. Those of the witnesses; 3d. Those of the officer and his assistants.

The justice's fees are, 1. Receiving complaint and issuing warrant; 2. Subpœna; 3. Entry, judgment, recording, &c.; 4. Trial; 5. Recognizances; 6. Mittimus; 7. Copies; 8. Travel.

The officer's fees are, 1. Service; 2. Travel; 3. Summoning witnesses; 4. Travel for same; 5. Conveyance of prisoner; 6. Attending court; 7. Aid, &c. In addition to these, there are the fees of the witnesses.

WITNESSES FEES. Each witness is entitled to fifty cents a day for attendance, and four cents for each mile's travel, going out and returning home.⁴

In taxing the bill of costs, the name of each witness must be separately mentioned; and the amount of his fees carried out against his name. And it is not sufficiently correct to carry out the amount of a witness' fees, without stating the number of miles he has travelled, and of the days he has attended.

¹R. S. ch. 169, sec. 8.

²Ib. sec. 9.

³Act of 1847. ch. 193, sec. 4.

⁴R. S. ch. 151, sec. 12.

OFFICER'S FEES. For the service of a warrant, the officer shall be entitled to fifty cents.¹

For each aid, necessarily employed in criminal cases, including expenses, one dollar per day, and in that proportion for a longer or shorter time ; and four cents a mile for travel in going out and returning home.²

For travel for the service of any warrant, four cents a mile, the travel to be computed from the place of service to the court or place of return, by the usual way ; but if the distance between those places be more than fifty miles, only one cent a mile shall be allowed for all travel exceeding that distance. Only one travel shall be allowed for any one precept ; but if the same be served on more than one person, the travel may be computed from the place of service most remote from the place of return, with all further necessary travel in serving such precept.³

For travel across any toll bridge or ferry, actually passed in serving or returning any precept, the sum by law payable at such bridge or ferry for a man and horse : for travel by water to, or from any island, or crossing any river where no ferry is established, in making service of a warrant, the court, where the process is returnable, may allow a reasonable charge.⁴

For the service of a subpoena, twenty-five cents, unless in special cases, when the justice may increase the fee to what he may judge reasonable.⁵

For attending court and keeping the prisoner, seventy-five cents for every twelve hours, and in that proportion for a greater or less time.⁶

No charge of any officer for service, travel or expenses paid, must be allowed, unless the items be expressly stated, and the amount of each.⁷

The statute makes no provision for the expenses incurred by the conveyance of prisoners. But it has nevertheless, we believe, been customary to allow such charges, where necessary and reasonable.

¹R. S. ch. 151, sec. 4.

²Ib.

³Ib.

⁴Ib.

⁵Ib.

⁶Ib.

⁷Ib.

CHAPTER IX.

OF CERTIFYING PROCESS, RETURNING RECOGNIZANCES, ACCOUNTING FOR COSTS, &c.

I. CERTIFYING PROCESS AND RETURNING RECOGNIZANCES.

If the party, recognizing for further examination, shall not appear at the time appointed, before the magistrate, for such further examination, the magistrate shall record the default, and certify his recognizance, with the record of the default, to the district court; and the like proceedings shall be had thereon as on a breach of the condition of a recognizance for appearance before the court.¹

All examinations and recognizances, taken by a magistrate pursuant to the provisions of the one hundred and seventy first chapter of the Revised Statutes, should be certified and returned to the county attorney, or clerk of the court, before which the party is bound to appear, on or before the first day of the session; and, in cases of neglect of such justice, he may be compelled by rule of court, and, if it be disobeyed, by attachment for contempt.²

Every order by a magistrate discharging recognizances shall be filed in the office of the clerk of the court at which the party and the witnesses were bound to attend; and every order, suspending the commitment of the party charged, shall be delivered to the keeper of the jail, and shall, if so filed and delivered, and not otherwise, forever bar all remedy by civil action, for such injury.³

Every recognizance, for keeping the peace, shall be transmitted to the district court on or before the first day of the next ensuing term, and shall there be filed by the clerk, as of record.⁴

When the justice has determined to require the prisoner to find bail, and bail is furnished, the first thing to be done is, to make a full record of the proceedings, because a copy of the record should be sent up with the other proceedings. This record should contain a complete statement of the proceedings. He should also make out at length th

¹R. S. ch. 171, sec. 10.

²Ib. sec. 24.

³Ib. sec. 26.

⁴R. S. ch. 169, sec. 14.

original recognizance, which is to be sent up, and copy the same into his book of records.

If the recognizance taken is for appearance before another magistrate, it should be certified to that court, because justices of the peace, taking recognizances for the appearance of a party before another tribunal, must return them to the court where the principal recognizer is to appear, and if defaulted there, by reason of non-appearance before such tribunal, that court, in case it has not jurisdiction to issue *scire facias* and render judgment thereon, will certify all the previous proceedings, including the taking of the recognizance and the default thereon, to such other court as has further jurisdiction thereon.¹

II. OF ACCOUNTING FOR FINES, FORFEITURES AND COSTS.

Every justice of the peace shall be held to render an account of, and pay over all fines and forfeitures, by him received upon convictions and sentences before him, whether accruing to the State or the county, to the treasurer of the county; and, in cases where they accrue to the town, to the treasurer of the town, within six months after he shall have received the same. In case of any neglect, he must forfeit, in each instance, double the amount, to be recovered in the name of the county or town treasurer, as the case may be.²

All costs, imposed by justices of the peace, and accruing to the State, must be paid into the county treasury.³

The justice should keep his official accounts with scrupulous accuracy. Errors may and undoubtedly do often occur, from a neglect of the magistrate to keep his accounts with the same care which he would feel compelled to observe in his dealings with other men.

It is necessary also that he should make his returns promptly, otherwise he may involve himself in serious and embarrassing liabilities, besides incurring the risk of having his commission withdrawn. The time prescribed is limited to six months. The better way would be to make the returns as soon as practicable after the fines and forfeitures are received.

¹9 Met. 409.

²R. S. ch. 152, sec. 22.

³Ib. sec. 27.

PART III.

FORMS AND PRECEDENTS.

CHAPTER I.

FORMS IN CIVIL PROCEEDINGS.

I. WRITS.

*(Original Summons.)*¹

STATE OF MAINE.

C—, ss. To the sheriff of the said county of C—, or either of
[L. s.] his deputies, or the constables of the towns within the said
county, or to any or either of them, Greeting.

In the name of the State of Maine, you are required to summon and give notice unto A. B. of, &c. (if he may be found in your precinct) to appear before me, C. W. H. Esquire, one of the justices of the peace for the county aforesaid, at — in P—, on — the — day of — at — of the clock in the — noon; then and there to answer unto C. D. of, &c. in a plea, &c.

To the damage of the said plaintiff (as he says) the sum of twenty dollars, as shall then and there appear, with other due damages. And of this writ, with your doings therein, you are to make true return unto myself at or before the said — day of —.

Dated at P—, aforesaid, the — day of —, in the year of our Lord one thousand eight hundred and —.

C. W. H.

*(Capias, or Attachment.)*²

STATE OF MAINE.

C—, ss. To the sheriff of the said county of C—, or either of
[L. s.] his deputies, or the constables of the town of W—, within the
said county, or to any or either of them, Greeting.

In the name of the State of Maine, you are required to attach the goods or estate of A. B. &c. to the value of — dollars, and for want thereof to take the body of the said A. B. (if he may be found in your precinct) and him safely keep, so that he may be had before

¹R. S. ch. 114, sec. 1.

²Ib.

me, C. W. H. Esquire, one of the justices of the peace for the county aforesaid, at — in — on, &c. [As before.]

*(Summons when Goods are attached.)*¹

STATE OF MAINE.

C—, ss. To T. P. of D., in the county of C—, [addi-
[L. s.] tion.] Greeting.

In the name of the State of Maine, you are commanded to appear before me, J. D. Esquire, one of the justices of the peace for the county aforesaid at—, in B. on — the — day of —, at — of the clock, in the — noon, to answer unto E. L. of M. [addition] in a plea of —; which plea the said E. L. hath commenced to be heard and tried before me; and your goods or estate are attached to the value of — for security to satisfy the judgment which the said E. L. may recover upon the aforesaid trial. Fail not of appearance at your peril. Dated at B. aforesaid, the — day of —, in the year of our Lord —. J. D.

*(Trustee Writ.)*²

STATE OF MAINE.

W—, ss. To the sheriff of the said county of W—, or either of
[L. s.] his deputies, or the constables of the town of W—, within the
said county, or to any or either of them, Greeting.

In the name of the State of Maine, you are required to attach the goods or estate of A. B. of, &c. to the value of twenty dollars, and summon the said defendant (if he may be found in your precinct) to appear before me, F. H. D. Esquire, one of the justices of the peace for the county aforesaid, at my office, in W—, on, &c. then and there to answer to C. D. of, &c. In a plea, &c.

To the damage of the said plaintiff (as he says) the sum of twenty dollars, which shall then and there be made to appear with other due damages. And whereas the said plaintiff says that the said defendant has not in his own hands and possession, goods and estate to the value of twenty dollars, which can be come at to be attached; but has entrusted to, and deposited in the hands and possession of E. F. of, &c. trustee of the said defendant, goods, effects, and credits, to the said value: You are commanded therefore to summon the said trustee (if he may be found in your precinct) to appear before me, the justice aforesaid, at the time and place aforesaid, to show cause, if any he have, why execution, to be issued upon such judgment as the said plaintiff may recover against the said defendant in this action, (if any) should not issue against his goods, effects, or credits, in the hands and possession of the said trustee.

Hereof fail not, and make due return of this writ, and of your doings therein, unto myself, at or before the said time and place of trial.

Dated, &c.

F. H. D.

¹R. S. ch. 114, sec. 1.

²Ib.

(General Counts in Assumpsit usually inserted in the Blanks.)

In a plea of the case, for that the said defendant, on the day of the purchase of this writ, being indebted to the plaintiff in the sum of twenty dollars, according to the account annexed, and in the sum of twenty dollars for so much money then before that time had and received by the defendant to and for the use of the plaintiff, and for the sum of twenty dollars for so much money before that time, lent and accommodated by the plaintiff to the defendant at his request, and also in the sum of twenty dollars for so much money before that time laid out and expended by the plaintiff, for the use of the defendant, and at his request, in consideration thereof promised to pay the said several sums of money to the plaintiff on demand; yet he has never paid the same, nor any part thereof.

*(Scire Facias)*¹

STATE OF MAINE.

W—, ss. To the sheriff of our county of W—, or his deputy, or to any constable, &c. Greeting.
 [L. S.] Whereas C. M. of, &c. before me, E. R. a justice, &c., at a justice's court holden before me at W—, on, &c. by the consideration of me the said justice, recovered against L. C. of, &c. the sum of ——— debt or damage, and also ——— for costs and charges of suit in that behalf expended; whereof the said L. C. is convict, as to us appears of record; and although judgment be thereof rendered, yet the execution for the said debt or damage and costs doth yet remain to be made, whereof the said C. M. has made application to me to provide remedy for him in that behalf. Now to the end that justice be done, you are hereby commanded to make known unto the said L. C. that he be before me the said justice, at, &c. on, &c. to show cause (if any he has) wherefore the said C. M. ought not to have his execution against him the said L. C. for his debt or damage and costs aforesaid, and further to do and receive that which our said court shall then consider; and there and then have you this writ, with your doings therein. Herein fail not. Dated, &c. E. R.

(Forcible Entry and Detainer.)

STATE OF MAINE.

W—, ss. To A. B., Esquire, a justice of the peace and of the quorum within and for said county:

C. D. of, &c. complains against E. F. of, &c., that said E. F., on the ——— day of ———, having before that time had lawful and peaceable entry into the lands and tenements of the complainant, situated in ———, and whose estate in the premises was determined on the ———

¹R. S. ch. 114, sec. 1.

day of —, then did, and still does unlawfully refuse to quit the same; although the complainant avers, that he gave notice in writing to said — thirty days before the making of this complaint to quit the premises. Made at — aforesaid, this — day of —, 18—.

C. D.

W—, ss. A. D. 18—. Then the said — made oath that the above complaint, by him signed, is true.

Before me,

Justice of the peace.

The above form is intended to be used in a case where the relation of landlord and tenant exists, and where notice is required to be given. In other cases, the form must be changed to meet the particular circumstances.

(Form of warrant upon the above.)

STATE OF MAINE.

W—, ss. To the sheriff, &c.

[L. S.] Whereas —, of —, in said county has complained to me the subscriber, a justice of the peace and of the quorum within and for said county, against — of —, that said — on the — day of —, 18—, having before that time had peaceable and lawful entry into the the lands and tenements of the complainant, situated in —, and whose estate in the premises was determined on the — day of — 18—, then did, and still does unlawfully refuse to quit the same; although the complaint avers that he gave notice in writing to said — thirty days before the day of the making of his complaint, to quit the premises.

You are therefore commanded, that you summon the said —, if he may be found in your precinct, to appear before me, at — in said —, on the — day of — 18—, at — of the clock, in the — noon, to shew cause, if any he have, why judgment should not be rendered and a writ of possession should not issue against him for the possession of the lands and tenements aforesaid, with costs of suit. And have you there this writ, &c.

(Replevin when cattle are impounded.)¹

STATE OF MAINE.

W—, ss. To the sheriff of our county of W—, or his deputy, or [L. S.] to either of the constables of the town of W—, in said county,

Greeting.

We command you, that you replevy [here insert a description of the beast or beasts impounded] belonging to P. D. of W—, [addition] now distrained or impounded by S. P. of W—, [addition] in the com-

¹R. S. ch. 114, sec. 1.

mon pound in said W—, (or in such other place as they may be restrained) and them deliver unto the said P. D. *Provided*, the same are not taken and detained upon mesne process, warrant of distress, or upon execution, as the property of the said P. D. and summon the said S. P. to appear before J. S., one of our Justices of the peace for our said county, at his dwelling-house in W—, on the — day of — at — of the clock in the — noon, to answer unto the said P. D. in a plea of replevin, for that the said S. P., on the — day of — at a place called A. in W—, aforesaid, unlawfully took and impounded the said —, and the same unjustly detained to this day, to the damage of the said P. D., as he saith, the sum of — dollars, as shall then and there appear, with other due damages: *Provided*, he, the said P. D. shall give bond, with sufficient surety or sureties, to the said S. P. in —, being double the value of the said beasts, to prosecute his said replevin to final judgment, and to pay such damages and costs as the said S. P. shall recover against him, and also to return the said — in case such shall be the final judgment. And of this writ, with your doings hereon, and the bond you shall take, you are to make return to our said justice, on or before the said — day of —, at — o'clock in the — noon. Witness J. S. our said justice, at W—, in said county, this — day of —, *Anno Domini*, 18—.

J. S. justice of the peace.

(*Writ of replevin for goods.*)¹

STATE OF MAINE.

[L. S.] W—, ss. To the sheriff of our county of —, or his Deputy, or to any constable in any town in said county, Greeting. We command you that you replevy the goods and chattels following, viz. (here enumerate, and particularly describe them) belonging to — of — now taken and detained by — of —, and them deliver unto the said —, provided the same are not taken and detained upon mesne process, warrant of distress, or upon execution, as the property of the said —, and summon the said —, that he appear before me, A. B. Esquire, a justice of the peace within and for said county, at my dwelling house, in — on the — day of — 185—, at — of the clock, in the — noon, to answer unto the said — in a plea of replevin; for that the said —, on the — day of —, at said —, unlawfully and without any justifiable cause, took the goods and chattels of the said — as aforesaid, and them unlawfully detained to this day; To the damage of the said —, as he says the sum of — dollars.

Provided he, the said —, shall give bond to the said —, with sufficient surety or sureties, in the sum of — dollars, being twice the value of the said goods and chattels, to prosecute the said replevin

¹R. S. ch. 114, sec. 1.

to final judgment, and to pay such damages and costs as the said — shall recover against him, and also to return and restore the same goods and chattels, in like good order and condition as when taken, in case such shall be the final judgment; and have you there this writ, with your doings herein, together with the bond you shall take.

Witness, A. B. Esquire, at — the — day of — in the year of our Lord one thousand eight hundred and fifty—

A. B. Justice of the peace.

II. SUBPŒNA.

STATE OF MAINE.

W—, ss. To A B. of W—,

Greeting.

You are hereby required, in the name of the State of Maine, to make your appearance before —, to give evidence of what you know relating to an action or plea of — then and there to be heard and tried between — plaintiff, and — defendant. Hereof fail not, as you will answer your default, under the pains and penalty in the law in that behalf made and provided. Dated at — the — day of — in the year of our Lord one thousand eight hundred and fifty—

III. COMPLAINT FOR COSTS.

To A. B., a justice, &c. Complains C. D. of, &c. against E. F. of, &c. for that he, the said C. D. was summoned at the suit of the said E. F. to appear before your honor this — day of, &c., at, &c., but the said E. F. has failed to enter his said action, and prosecute the same, but has discontinued the same. Wherefore the said C. D. prays judgment for his costs in this behalf sustained.

IV. ABSENT DEFENDANT.

(Notice.)

STATE OF MAINE.

W—, ss. At a justice's court holden at W—, before J. C., one of the justices, &c.

A. D. 1846.

E. W. et al. Pl'ffs.

vs.

W. O. Def't.

In a plea of [set forth the declaration] as appears by the writ in this action. And now it appearing to said justice that said defendant at the time of the service of this writ was not an inhabitant of this State, and had no agent or attorney within the same; ordered that notice be given to said defendant to appear at a justice's court to be holden, &c. or his default will be recorded, and judgment thereof rendered against him, and that said notice be given by forwarding to said defendant by mail at C—, in the State of N. H., an attested copy of this order — days at least before the day of said court.

J. C., justice of the peace.

V. MOTION TO DISMISS.

W—, ss. At a justice's court, &c.

A. B. vs. C. D.

And now the defendant comes and moves to dismiss said action, because he says, [Insert the cause.]

By his attorney, &c.

VI. MOTION TO AMEND.

W—, ss. At a justice's court, &c.

A. B. vs. C. D.

And now the plaintiff comes, and moves to amend his writ by inserting, &c. or, by striking out, &c.

VII. LOSS OF WRIT.

(*Affidavit of Attorney.*)

W—, ss. At a justice's court, &c.

A. B. vs. C. D.

I, J. S. of, &c. an attorney and counsellor at law, do depose and say, that I believe, and have no doubt, that the instrument hereto annexed, marked *A*, is a true and exact copy of the original writ in the above action. Said writ was made by me, and this copy has been made from the minutes in my docket, made at the time it was sued out, which are full and distinct. And I do further say, that said original writ has been lost without fault or design on my part.

J. S.

Sworn to before me, J. D. justice, &c.

(*Affidavit of Officer.*)

I, E. E. of, &c. a deputy sheriff, &c. do depose and say, that I believe and have no doubt that the return, marked *B*, on the annexed instrument, marked *A*, is a true and exact copy of the return of the original writ in this action. It is made out and completed from my minutes, made at the time of the original service.

E. E. dep. sheriff.

Sworn to before me,

J. D. justice of the peace.

The affidavit of the plaintiff may be made in the same form, with obvious changes.

VIII. OFFER TO BE DEFAULTED.

W—, ss. At a justice court, &c.

A. B. vs. C. D.

And now the said C. D. this — day of —, offers and consents to be defaulted, and that judgment may be entered against him for a

specified sum as damages, to wit, for the sum of ——— dollars; and prays that this offer may be entered on record, and the time when the same is made.
C. D.

IX. MOTION FOR LEAVE TO PAY MONEY INTO COURT.

W—, ss. At a justice court, &c.

A. B. vs. C. D.

And now the said C. D., by his attorney, moves for leave to bring in the sum of ——— dollars, and that unless the plaintiff accept the same, in full discharge of the damages claimed against him, the said C. D., the sum so brought in may be paid out of court to the plaintiff or his attorney, and the amount thereof be stricken out of the declaration, and no evidence thereof be given at the trial; and that if the plaintiff shall elect to receive said sum, in full discharge of the damages claimed by him, he may be ordered to tax his costs, that the defendant may pay the same.
E. F., defendant's att'y.

X. PLEA OF GENERAL ISSUE, IN ASSUMPSIT.

W—, ss. At a justice court, &c.

A. B. vs. C. D.

And the said C. D., by his attorney, ———, comes and defends the wrong and injury, when, &c., where, &c. and saith that he never promised in manner and form as the said A. B. has in his declaration alleged against him, and of this he puts himself upon the country.

By ———, deft's. attorney.

XI. PLEA OF ABATEMENT IN ASSUMPSIT.

W—, ss. At a justice court, &c.

A. B. vs. C. D.

And the said C. D. prays judgment of the said writ and declaration, because he says that the said several supposed promises in the said declaration mentioned, if any such were made, were, and each of them was made jointly with one G. H., who is still living, and residing at ———, and not by the said C. D. alone; wherefore, inasmuch as the said G. H. is not named in the said writ or declaration, together with the said C. D., he, the said C. D., prays judgment of the said writ and declaration, and that the same may be quashed.

By his attorney,

E. F.

XII. GENERAL DEMURRER TO DECLARATION.

W—, ss. At a justice court, &c.

A. B. vs. C. D.

And now the said C. D. says, that the said declaration of the plaintiff is not sufficient in law, and thereof prays judgment, and for his costs.

By his attorney,

E. F.

XIII. SUMMONS TO ADMINISTRATOR OF PLAINTIFF, DECEASED, TO COME IN AND PROSECUTE.

W—, ss. To the sheriff of our county of W—, or his deputy, or [L. s.] to either of the constables of the town of W—, in said county, Greeting.

In the name of the State of Maine, you are commanded to summon C. B. of W—, in said county, gentleman, as he is administrator of the estate of C. S. late of said W—, deceased (if he may be found in your precinct) to appear before me J. S., a justice of the peace in and for said county, at a justice court to be holden, &c.* to prosecute a suit commenced by the said C. S. in his life time against one C. N. of W—, aforesaid, painter, which is now pending before me as such justice, wherein the said plaintiff declares as follows, to wit: In a plea, &c. [setting forth the declaration] to the damage of the said plaintiff as he therein says, the sum of twenty dollars. Hereof fail not, &c.

Dated, &c.

J. S. justice of the peace.

XIV. SUMMONS TO ADMINISTRATOR OF DEFENDANT TO COME IN AND DEFEND.

[Same as last to *. Continue as follows:]

Then and there to answer unto C. S. of, &c., and to take upon himself as such administrator, the defence of an action now depending before me, wherein the said C. S. is plaintiff, and the said C. N. is defendant, commenced in the life-time of the said defendant, and wherein the said plaintiff declares as follows, to wit, "In a plea, &c."

To the damage, &c. [As before.]

In case of insanity and marriage, vary the above forms.

XV. MOTION OF THE HUSBAND TO BE JOINED IN CASE OF MARRIAGE OF FEME SOLE PLAINTIFF.

W—, ss. At a justice court, &c.

A. B. vs. C. D.

And now J. N. comes and shows that since the commencement of this action the plaintiff hath intermarried with him, and is now his lawful wife, and prays to be allowed to be joined with her, and prosecute this suit to final judgment.

16. CAPIAS FOR WITNESS.

STATE OF MAINE.

W—, ss. To the sheriff, &c. or to any constable, &c.

[L. s.] Whereas an action is now pending and on trial before me, A. B. a justice, &c. wherein C. D. is plaintiff and E. F. is defendant; and it has been made to appear to me, the said justice, that G. H. of, &c. has been duly summoned to appear before me as a witness in

said suit in behalf of said C. D., and has been tendered [or paid] his legal fees therefor; and the said C. D. hath not so appeared, and hath thereby committed a contempt of this court; you are hereby commanded to take the body of the said C. D. (if he may be found in your precinct) and bring him forthwith before me, the said justice, to answer to the said charge of contempt, and also to give evidence of what he knows relative to the plea in said suit.

Hereof fail not, and make due return, &c.

Given, &c.

A. B. justice of the peace.

17. JUDGMENT.

(See Forms for Records.)

XVIII. APPEALS.

(See Forms for Records.)

XIX. GENERAL RECOGNIZANCE.

STATE OF MAINE.

W— ss. Be it remembered that on the — day of — in the year, &c. personally appeared before me, J. S. Esquire, one of the justices of the peace in and for the county of W—, A. B. as principal, and C. D. and E. F. as sureties, and acknowledged themselves to be jointly and severally indebted unto G. H. in the sum of —, to be levied on their several goods or chattels, lands or tenements, and for want thereof, upon their bodies, to the use of the said A. B. if default be made in the performance of the condition here under written.

The condition of the above-written recognizance is such, that if the above named A. B. shall prosecute with effect an appeal by him made from a judgment given by me the said justice against him at a court held before me at, &c. on, &c. in favor of the said G. H. for the sum of — and costs of suit, taxed at — and shall pay all such costs as may arise after said appeal:

Then the above-written recognizance to be void, otherwise to abide in full force.

Fees, \$0,20.

J. S. justice, &c.

XX. CONDITION OF RECOGNIZANCE OF DEFENDANT APPEALING IN FORCIBLE ENTRY, WHEN PLAINTIFF CLAIMS RENT DUE.

The condition of this recognizance is such, that if the above named A. B. shall enter and prosecute with effect an appeal made by him from a judgment given by me, the said justice, against him at a court, &c. in favor, &c. and shall pay all intervening costs, and such reasonable intervening rent for the premises as such justice shall adjudge, in case his judgment shall not be reversed on such appeal.

If a brief statement of title in himself is filed by the defendant, the recognizance is to pay all intervening damages and costs, and reasonable intervening rent for the premises.

XXI. EXECUTIONS.

STATE OF MAINE.

W—, ss. To the sheriff of our county of W—, or either of his [L. s.] deputies, or the constables of the town of W—, within our said county, or any, or either of them, Greeting.

Whereas A. B. of, &c. on the — day of —, before F. H. D. Esquire, one of the justices of the peace for our county aforesaid, recovered judgment against C. D. &c. for the sum of — dollars and — cents, debt or damage, and — dollars and — cents, for charges of suit, as to us appears of record, whereof execution remains to be done :*

We command you, therefore, that of the money of the said debtor, or of his goods or chattels within your precinct, at the value thereof, in money, you cause to be levied, paid, and satisfied unto the said creditor the aforesaid sums, being — dollars and — cents, in the whole, with interest from the time the said judgment was rendered, and also that out of the money, goods or chattels of the said debtor, you levy — cents more for this writ,† together with your own fees.

[If the judgment debtor is liable to arrest, add the following: And for want of such money, goods, or chattels of the said debtor, to be by him shown unto you, or found within your precinct, to the acceptance of the said creditor, for satisfying the aforesaid sums,—we command you to take the body of the said debtor and him commit unto our jail in W—: And we command the keeper thereof, accordingly, to receive the said debtor into our said jail, and him safely to keep until he pay the full sums above mentioned, with your fees, or that he be discharged by the said A. B., the creditor, or otherwise, by order of law.] Hereof fail not, and make return of this writ, with your doings therein, unto our said justice, within three months next coming. Witness our said justice, at W—, the — day of — in the year of our Lord one thousand eight hundred and —.

(Trustee Execution for Plaintiff.)

[As before to *] And whereas, by the consideration of the same justice, execution was likewise awarded for the same sums against the goods, effects, and credits of the said C. D. in the hands and possession of E. F. of, &c. trustee of the said C. D., as to us appears of record, whereof execution remains to be done.

We command you, therefore, that of the money of the said debtor, or of his goods or chattels in his own hands and possession, and of the goods, effects and credits of the said debtor in the hands and possession

† If it be an alias execution, here insert the words, “ And one (or two, as the case may be) former execution.”

of the said E. F. jointly and severally, you cause to be paid and satisfied unto the said A. B. at the value thereof in money, the aforesaid sums being — dollars, and — cents, in the whole, with interest from the time the said judgment was rendered; and also that out of the money, goods or chattels of the said debtor, you levy — cents more for this writ, and thereof also satisfy yourself for your own fees. [And if liable to arrest add; and for want of such money, goods, or chattels of the said debtor in his own hands and possession, to be by him shown unto you, or found within your precinct, to the acceptance of the said creditor, and for want of goods, effects, and credits of the said debtor in the hands and possession of the said trustee, to be by him discovered and exposed to you, to satisfy the several sums aforesaid, with your fees, we command you that you take the body of the said debtor, and him commit unto our jail in W—, in our county of W—, aforesaid; and we command the keeper thereof, accordingly to receive the said debtor into our said jail, and him safely to keep until he pay the full sums above mentioned, with your fees, or that he be discharged by the said A. B. the creditor, or otherwise, by order of law.]

Hereof fail not, and make return of this writ, with your doings therein, unto our said justice, within three months next coming.

Witness, &c.

(Replevin Execution.)

If for the plaintiff, the judgment being for damages and costs, follow the first form.

For defendant when Beasts are Replevied. Writ of Return.

STATE OF MAINE.

W—, ss. To the sheriff of our county of W—, or his deputy,

Greeting.

[L. S.] Whereas P. D. of W—, in our county of — [addition] lately replevied the beasts following, [here insert such description of them as they had in the writ of replevin] which S. P. of W—, in our county of — [addition] had unlawfully taken and unjustly detained, as the said P. D. suggested, and caused the said S. P. to be summoned before J. S., one of our justices of the peace, for our said county of W—, to answer unto the said P. D. for such supposed unlawful taking and detaining, at a day now passed. And whereas upon the — day of — at W—, aforesaid, upon a hearing of the cause of taking and detaining the said beasts, before our said justice, it appeared that the same taking and detaining was lawful and justifiable : * whereupon it was then and there considered, that the same beasts be returned, and restored to the said S. P. irrepleviable, and that the said S. P. recover against the said P. D. the sum of — damages, for his taking the same, by the said process of replevin, and the further sum of —

for his costs, arisen in the defence of the said suit, as by the record of our said justice, before him remaining, to us appears; whereof execution remains to be done; we command you, therefore, that you forthwith return and restore the same beasts unto the said S. P. And also that of the money of the said P. D., or of his goods or chattels, within your precinct, at the value thereof in money, you cause to be levied, paid and satisfied unto the said S. P. the aforesaid sums, being — in the whole, with — more for this writ, together with your own fees; and for want of such money, goods or chattels of the said P. D. to be by him shown unto you, or found within your precinct, to the acceptance of the said S. P. for satisfying the aforesaid sums: We command you to take the body of the said P. D. and him commit unto our jail in W—: And we command the keeper thereof, accordingly, to receive the said P. D. into our said jail, and him safely to keep, until he pay the full sums above mentioned, with your fees, or that he be discharged by the said S. P., the creditor, or otherwise by order of law. Hereof fail not, and make return of this writ, with your doings therein, unto our said justice, within three months next coming. Witness our said justice at W—, the — day of — in the year of our Lord —, J. S.

[If the judgment be for damages, instead, then as follows:]

STATE OF MAINE.

W—, ss. To the sheriff, &c., [as before to *] Whereupon it (L. S.) was then and there considered by me the said justice, that the said C. D. should recover against the said A. B. the sum of —, being the amount due for the penalty or forfeiture on said beasts [or the damages for which said beasts were impounded,] and the further sum of — being the legal fees, costs, charges and expenses incurred by reason of said distress, and — for charges of suit, as to us appears of record, whereof execution remains to be done.

We command you therefore, &c. [As before.]

(Execution for Plaintiff in Forcible Entry.)

STATE OF MAINE.

W—, ss. To the sheriff of our county of W—, or either of his deputies, Greeting.
(L. S.) Whereas A. B. of, &c. on the — day of — before me, F. H. D. Esquire, one of the justices of the peace for our county aforesaid, recovered judgment against C. D. of, &c. for the possession of certain premises described in his writ, to wit, &c. and for the sum of — for charges of suit, as to us appears of record, whereof execution remains to be done.

We command you, therefore, that you forthwith deliver possession of said premises to said A. B. and we further command you, therefore,

that of the money of the said debtor, or of his goods or chattels within your precinct, at the value thereof in money, you cause to be levied, paid, and satisfied unto the said creditor the aforesaid sum, being — dollars and — cents, in the whole: and also that out of the money, goods, or chattels of the said debtor, you levy — cents more for this writ, together with your own fees. And for want of such money, goods, or chattels of the said debtor, &c. [As before.]

XXII. SUMMONS TO PERSON HAVING RECORD OF DECEASED JUSTICE.¹

STATE OF MAINE.

W—, ss. To A. B. of — in the said county,

Greeting.

[L. S.] Whereas it has been made to appear to me, E. H., a justice &c. that C. D. late of —, in his life-time awarded judgment in favor of, &c. against, &c. for &c. and that said judgment remains unsatisfied; and the said — has applied to me to transcribe the record of said judgment to my book of records; you are hereby required to appear before me at, &c. and then and there have and produce the said record of said judgment, or submit yourself to an examination on oath as to the place where it may be found. Hereof, &c.

E. H. justice of the peace.

XXIII. RETURN OF A WRIT OF CERTIORARI.

W—, ss. To the justices of the S. J. C. &c. In obedience to the (L. S.) within precept, I hereby return certified copies of the record, of the original writ [or complaint] and of every paper filed in the case of, &c. and all things touching them, together with this writ of certiorari.

A. B. justice, &c.

XXIV. SUMMONS TO ASSIGNEE OF GOODS, ETC. IN HANDS OF TRUSTEE, TO APPEAR AND MAINTAIN HIS RIGHT.

STATE OF MAINE.

W—, ss. To the sheriff, &c.

Greeting.

[L. S.] Whereas C. D. of, &c. has sued out a writ before me J. S. a justice, &c. against A. B. of, &c. and E. F. his trustee, which has been duly served and entered, and whereas the said E. F. has appeared, and made answer, according to law, touching the goods, effects and credits of said A. B. in his hands or possession, and it appearing by said answer that said goods, effects and credits are claimed by G. H. of, &c., by force of an assignment from said A. B., dated, &c.

You are hereby directed to notify the said G. H. thereof (if he be

¹ Ante p. 81.

within your precinct) that he may appear at, &c. on, &c. if he see cause, and maintain his right under said assignment. And you will serve said notice by delivering to said G. H. an attested copy of this order, or by leaving a like copy at his last and usual place of abode, — days before the day of his appearance.

Witness my hand and seal, &c. Hereof fail not, &c.

J. S. justice of the peace.

XXV. LIBEL OF GOODS SEIZED.¹

To A. B. a justice, &c. The libel of C. D. shows that he has seized, &c. [setting forth the goods] because, &c. [giving the reason.] Wherefore he prays for a decree of forfeiture of the same according to the provisions of [mentioning the number of the statute referred to.] Dated, &c.

(Notice to Persons Interested.)

W—, ss. To all persons interested in [setting forth the goods] The libel of C. D. this day filed with me A. B. justice, &c. shows that he has seized said goods, because, &c. and prays for a decree of forfeiture of the same, according to the provisions, &c.

You are therefore hereby notified thereof, that you may appear before me, the said justice at, &c. on, &c. then and there to show cause, if any you have, why said goods should not be decreed forfeited.

(Writ of Restitution.)

STATE OF MAINE.

W—, ss. To the sheriff of our county of W—, or either of his deputies, or the constables of the town of W— within our [L. S.] said county, or any, or either of them. Greeting.

Whereas E. F. of &c. on the — day of —, before me, A. B. Esquire, one of the justices of the peace for our county aforesaid, recovered judgment against C. D. of, &c. for the restitution of the following goods, the property of the said E. F., by the said C. D. groundlessly seized, and without probable cause, and also for the sum of — dollars and — cents, damage, in that behalf sustained, and — dollars and — cents, for charges of suit, as to us appears of record, whereof, execution remains to be done. We command you therefore, that you forthwith restore to the said E. F. the said goods; and we further command you, that of the money of the said debtor, or of his goods or chattels within your precinct, at the value thereof in money, you cause to be levied, paid, and satisfied unto the said creditor the aforesaid sums, being — dollars and cents, in the whole; and also that out of the money, goods, or chattels of the said debtor

¹Ante p. 119.

you levy — cents more for this writ, together with your own fees. And for want of such money, &c.

XXVI. APPLICATION TO TAKE POOR DEBTOR'S OATH.¹

To —, Esquire, one of the justices of the peace, within and for the county of —.

Whereas I, the undersigned, —, of —, in said county of —, have been arrested by force of an execution which issued on a judgment obtained against me before —, within and for the county of —, on the — day of —, A. D. 185—, in favor of —, for the sum of — dollars and — cents damage, and costs of court, taxed at — dollars and — cents, —, and have given the bond required by law and referred to in the twenty-eighth section of the one hundred and forty-eighth chapter of the Revised Statutes of the State of Maine. Now therefore, I, the undersigned, claim the benefit of said statute, and request you, the said Justice, to cite the said creditor to appear before two justices of the peace and of the quorum, at the office of —, in —, in said county of —, on the — day of —, A. D. 185—, at — of the clock in the — noon, at which time I will submit myself to examination, and take the oath or affirmation as prescribed in the twenty-eighth section of the chapter above referred to, if allowed by the said justices, and the said creditor may be then and there present and object, if he shall see cause.

Dated at —, this — day of —, A. D. 185—.

STATE OF MAINE.

[L. s.] W—, ss. To —, of, &c. in the county of —, Greeting.

In the name of the State of Maine, you are hereby notified of the desire of the above named debtor, as expressed in the foregoing application; and you are hereby cited to appear before two justices of the peace and quorum (if you shall see cause,) at the time and place, and for the purposes mentioned in the foregoing application.

Given under my hand and seal, at said —, this — day of — in the year of our Lord one thousand eight hundred and —.

J. S., justice of the peace.

W—, ss. Having examined the above notification and return, and duly cautioned the said —, we have administered to him the oath [or affirmation] allowed in the act above referred to; and made out a certificate thereof in the form therein prescribed.

—, } Justices of the peace
—, } and of the quorum.

(Selection of Justices).²

To —. You are hereby selected by me, —, the within named debtor, to take the disclosure according to the within citation.

¹Ante p. 120.

²Ib.

To _____. You are hereby selected by me ____, the within named creditor, to take the disclosure according to the within citation.

Poor Debtor's Oath, and Certificate of Discharge.

I —, do solemnly swear, [or affirm, as the case may be] that I have not any estate, real or personal, in possession, reversion or remainder, except the goods and estate expressly exempted by statute from attachment and execution, and whatever property I have now disclosed; and, that I have not, since the commencement of this suit, or the time when the debt, or cause of action, or any part thereof, on which this suit was brought, was contracted by me, directly or indirectly sold, loaned, leased, or otherwise disposed of, or conveyed or entrusted to any person or persons, whomsoever, all or any part of the estate, real or personal, whereof I have been the lawful owner or possessor, with any intent or design to secure the same, or to receive or expect any profit, advantage or benefit therefrom, to myself or others, with an intent or design to defraud any of my creditors. So help me God, (or "this I do under the pains and penalties of perjury," if the debtor affirms.)

STATE OF MAINE.

[L. s.] W—, ss. To the sheriff of our county of —, or his dep-
[L. s.] uty, and to the keeper of the jail at —, in said county :

We the subscribers, two disinterested justices of the peace and of the quorum, in and for said county of —, hereby certify that —, a poor debtor, arrested on a certain execution issued by —, begun and holden at —, within and for the county of —, on the — day of —, A. D. 185—, on a judgment recovered by —, against him — for the sum of — dollars — cents, debt or damage, and — dollars — cents for costs of suit, which judgment is dated the — day of —, 185—, and execution dated the — day of —, 185—, and committed to the jail at —, aforesaid, [or enlarged by giving bonds to the creditor, as the case may be] hath caused —, the creditor, to be notified according to law, of his, the said debtor's desire of taking the benefit of the one hundred and forty-eighth chapter of the Revised Statutes of this State, entitled, "of the relief of poor debtors;" that in our opinion he is clearly entitled to have the oath, prescribed in the twenty-eighth section of said chapter, administered by us; and that we have, after due caution to him, administered said oath to him.

Witness our hands and seals, this — day of —, in the year
185—. —, { Justices of the peace
 —, { and of the quorum.

XXVII. APPOINTMENT OF APPRAISERS OF LOST GOODS.

STATE OF MAINE.

[L. S.] W—, ss. To A. B. and C. D., &c. E. F. having represented to me that he is the finder of, &c. lost goods, [or stray

beasts] and the same appearing to me to be true, you are hereby appointed to appraise on oath at their true value, said goods [or beasts.] When you have performed that service, you will return this warrant into the town clerk's office for the town of W—, in said county, within seven days next coming. Given, &c.

F. H. D., justice of the peace.

Annex the certificate of the oath.

XXVIII. LIBEL OF BEASTS IMPOUNDED.

STATE OF MAINE.

C—, ss. To A. B., a justice of the peace within and for said county, Esquire.

O. P., pound keeper of the town of P—, in said county, represents, that on the — day of —, 185—, C. D. of —, in said county, committed to the pound in said town [here describe the beasts] taken up in the highway (or in the enclosure or possessions of said C. D. as the case may be) in said —, as estrays, and that the said C. D. demands the sum of — dollars as damages, and the charges, fees and costs attending the impounding the same; and that the said O. P. forthwith posted, and kept posted for three days, at his dwelling house, and in two other public places, in the same town, advertisements, by him subscribed, stating the name of the impounder or finder, the time and cause of impounding, and a brief description of the beasts, and notifying the owner to pay what is legally and justly demandable, and to take the beasts away, [and also gave the like public notice by the town crier, if there be one in the town] and also caused a copy of such advertisement to be inserted in the —, a newspaper printed in said county. The owner of said beasts, not having within twenty days next after the posting and publishing such notice, appeared and claimed said beasts, and paid what is legally demandable, the said O. P., in the name and in behalf of said C. D., the impounder, prays that a decree of forfeiture may be made by said justice, and that said beasts may be disposed of according to law.

Dated, &c.

O. P.

This proceeding is not to be had, if the value of the beasts does not exceed five dollars.¹

(*Decree of Forfeiture.*)

STATE OF MAINE.

C—, ss. To the sheriff of our county of —, or his deputy, or any constable of the several towns in the same county, Greeting.

[L. s.] Whereas C. D. of — within the county of — through his agent, O. P., pound keeper, by the consideration of our justice court, holden at —, on —, by —, Esquire, a justice of the peace within and for said county, obtained a decree for the sale of the

¹ Acts of 1845, ch. 140.

following [here insert a description of the property, as in the libel] with costs, taxed at —, as to us appears of record, whereof execution remains to be done; we command you, therefore, to make sale of the same, in manner prescribed by law for the sale of goods and chattels, in satisfaction of executions; and after deducting your lawful fees, you will pay over the residue to the said pound keeper, and take his receipt, thereon, for the same. Hereof fail not, and make due return, with your doings therein, within thirty days. Witness &c.

XXIX. FORMS FOR CALLING MEETINGS OF CORPORATIONS, WHEN NO PERSON IS DULY AUTHORIZED, &c.¹

Application.

To A. B. a justice, &c. The application of C. D., E. F. and G. H., members of, &c., a corporation duly established by law, shows that there is no person duly authorized to call or preside at a legal meeting thereof, by reason of, &c.

Wherefore they pray that a warrant may be issued to the said C. D., directing him to call a meeting of said corporation, to be held at, &c. — on, &c. — by giving such notice as has previously been required by law, and also directing him to preside at said meeting until a clerk shall be duly chosen and qualified.

Dated, &c.

Warrant.

STATE OF MAINE.

[L. S.] C—, ss. To C. D. &c. C. D. E. F., and G. H., of, &c. having made application to me, A. B., a justice, &c., stating, &c. and praying, &c.

You are hereby commanded to call a meeting of said corporation to be holden, &c. [here insert the purposes of the meeting, and directions for the notice required by law.] And you will preside at said meeting until a clerk shall be duly chosen and qualified. Given, &c.

A. B. justice of the peace.

XXX. OF ORGANIZING CORPORATIONS, &c.

1. Proprietors of distinct Fields enclosed in common.²

To F. H. D., a justice, &c. The application of A. B. and C. D. shows that they are proprietors with E. F., G. H., I. J. and J. S., of several distinct lots or pieces of land, enclosed in one common field, and are desirous of organizing themselves and of holding regular meetings from time to time for the purpose of managing their common concerns, according to the statute in that behalf provided.

¹R. S. ch. 76, sec. 8.

²R. S. ch. 29, sec. 16.

Wherefore they pray that a warrant may be issued, directed to the said A. B., commanding him to call a meeting of said proprietors to be holden, &c. for the following purposes, to wit:

Dated, &c.

Warrant.

STATE OF MAINE.

C—, ss.

[L. s.] To A. B., &c. Whereas, &c. [setting forth the application] you are hereby directed to call a meeting of said proprietors to be holden, &c. for the purpose aforesaid.

Given, &c.

F. H. D., justice of the peace.

2. *Proprietors of Lands, &c. held in Common.*¹

The application is by five or more, proprietors of lands, [or wharves] &c. held in common, and is for the purpose "of forming themselves into a corporation." The warrant is to be directed to one of the applicants, should recite the application, and direct him "to call a meeting of all said proprietors to be holden, &c." "for the purpose of forming themselves into a corporation."

3. *Proprietors of Libraries.*²

The application is by five or more "proprietors of a library in the town of W., in common with," &c. [at least seven] and is for the purpose of "forming themselves into a society, or body politic, for the purpose of holding, preserving, increasing, and using such library." The warrant should recite the application, and be directed to one of the applicants, requiring him "to call a meeting of said proprietors to be holden, &c. for the purpose, &c."

4. *Proprietors of Aqueducts.*³

To F. H. D. a justice, &c. The application of A. B. &c. shows that they have associated, by an agreement in writing, to become the proprietors of an aqueduct for the purpose of conveying fresh water into [or within] the town of W—, in said county, [or the proprietors of funds for establishing an aqueduct, &c.] by the name and style of —, and that they are desirous that a meeting of said proprietors should be holden, &c. for the following purposes, to wit, &c. according to the statute, &c.

Wherefore they pray that a warrant may be issued, directed to said A. B. requiring him to call such meeting.

The warrant should follow the application.

¹R. S. ch. 85, sec. 1.

²R. S. ch. 84, sec. 1.

³R. S. ch. 83, sec. 1.

5. *Private Ways and Bridges.*¹

The application of A. B., C. D. and E. F. shows that they are proprietors in common with, &c. of a private way [or bridge] in the town of W. in said county, and are desirous of calling a meeting of said proprietors to be holden, &c. for the purpose of organization and doing such other business as may then and there be done, according to the statute in such behalf provided.

Wherefore they pray, &c.

The warrant follows the application.

6. *Parishes.*²

To C. W. H., a justice, &c. (If the parish be incorporated already.) The application of A. B., C. D., E. F., G. H. and J. S. shows that they are qualified voters of an incorporated parish in the town of W. in said county, called, &c., and that the assessors of said parish unreasonably refuse to call a meeting of the parish (or to insert an article requested, in the warrant for calling a meeting, as the case may be) though duly requested so to do.

Wherefore they pray that a warrant may issue, directed to one of the applicants herefor, requiring him to warn the qualified voters of said parish to meet at —, on —, to act upon the following matters and things, to wit, &c., according to the statute in that behalf provided.

The warrant follows the application.

7. *Mode of calling a meeting to form a Parish.*³

To C. W. H. a justice, &c. The undersigned, each of the age of twenty one years or more, desirous of becoming an incorporated parish or religious society, a majority of them residing in said county, request that you will issue your warrant to one of them, directing him to notify the other applicants to meet at some proper place to be expressed in such warrant, to be held on the — day of —, 18—, for the above purpose.

The warrant follows the application, expressing also the place of meeting.

XXX. CALLING TOWN MEETINGS.⁴*Warrant.*

STATE OF MAINE.

W. ss. To any constable of the town of W. in said county. [L. S.] Whereas A. B. &c. (ten or more) legal voters of said town have made application to me, C. D. a justice, &c. showing that the selectmen of said town have unreasonably refused to call a meeting of

¹R. S. ch. 25, sec. 107.

²R. S. ch. 18, sec. 7.

³Ib. sec. 1.

⁴R. S. ch. 5, secs. 2, 3, 4, 5.

the inhabitants of said town qualified to vote in town affairs, and such appearing to me to be the case, you are hereby directed to summon the inhabitants of said town of W. qualified to vote in town affairs, to assemble at the town hall in W. on, &c. then and there to act upon the following articles, to wit. Given, &c.

XXXI. OF FORMING LIMITED PARTNERSHIPS.¹

A. B. and C. D. both of W. in the county of W. as general partners, and E. F. of S. in the county of H. as special partner, have formed a partnership under the name and firm of A. B. & Co. for the purpose of transacting, &c. in said town of W. to commence &c. and to terminate, &c. The said E. F. has contributed \$ — capital to the common stock.

A. B., C. D., E. F.

The acknowledgment to be taken by the justice in the usual form.

XXXII. JUSTICE RECORDS.

STATE OF MAINE.

W—, ss. At a court held before me, C. W. H., Esquire, one of the justices of the peace, within and for said county, at my office in W—, in said county, on the — day of —, in the year, &c.

B. S. F. of, &c., plaintiff,

vs.

W. F. B. & N. F. both of, &c., defendants, and

J. G. of, &c. trustee.

In a plea of, &c. [setting forth the declaration] (if a complaint,) in a complaint wherein the said F. complains &c. [setting forth the complaint] as by writ on file, dated, &c. will more fully appear, on the — day of, &c. the plaintiffs appeared and entered their action. The defendants also appeared by A. B. their attorney.

(If it appears that title to Real Estate is concerned.)

As it appears that the title to real estate is concerned or brought in question in this action, and the plaintiff [or defendant] requests to have the same transferred to the district court next to be holden' &c. and has recognized, as the law directs, to enter the same in said court, therefore all proceedings before me are stayed, and said action is transferred to the district court at said term, according to law.

(Pleas in Abatement.)

Judgment for Plaintiff that the Defendant answer over. The defendant appears for this purpose only, by A. B. his attorney, and files his plea in abatement as follows, &c. And upon the said plea,

¹R. S. ch. 44, sec. 1.

after hearing all matters and things concerning the same, it appears to me that the writ in this action ought not to be quashed* ; and it is therefore ordered that the said defendant answer over to the action.

For the Plaintiff, final. [As before to *] It is therefore considered by me, the said justice, that the said B. S. F. recover against the said W. F. B. and N. F. the sum of — debt or damage, and — charges of suit, and execution is awarded therefor against, &c.

For the Defendant. It appears to me that the writ in this action ought to be quashed. It is therefore considered by me, the said justice, that said writ be quashed, and that said W. F. B. and N. F. recover of the said B. S. F. the sum of — for their costs of suit in this behalf sustained. And execution is awarded, &c.

(Motion to Dismiss.)

Judgment for Plaintiff. The defendant appears by A. B., his attorney, and files a motion to dismiss this action, because he says, &c., and upon the said motion, after hearing all matters and things concerning the same, it appears to me, the said justice,* that this action should not be dismissed.

Judgment for defendant. [As before to*] That this action should be dismissed. It is therefore considered by me, the said justice, that this action be dismissed, and that the said W. F. B. and N. F. recover, &c.

(Non-suit.)

And now the defendant [again] appears, and the plaintiff does not appear further to prosecute this suit. Wherefore, it is considered by me, the said justice, that the defendant recover of the plaintiff his costs of suit, taxed, &c.

(Default.)

And now the defendant does not appear, but makes default : Whereupon it is considered, &c.

(Amendment.)

The plaintiff, by leave of court, amended his writ by adding a new count as follows, to wit ; &c., as by motion on file appears.

(Set-off.)

The defendant files his account against the plaintiff in set-off, as by set-off on file more fully appears.

(Trustee answers and is charged.)

And the said J. G. came into court and submitted himself to an examination on oath, as by the interrogatories on file appears. Where-

upon he was adjudged to be a trustee of said defendant. [*If judgment be given for the plaintiff in the suit, add.*] It is therefore considered by me, the said justice, that said B. S. F. recover, &c., and execution is awarded therefor against the goods, effects and credits of said defendant, in the hands of said trustee, as well as against the body and goods of said defendant.

(*Trustee discharged.*)

Whereupon it was adjudged that he is not a trustee of said defendant, and it is considered by me, the said justice, that the said J. G. recover of the said B. S. F. his costs taxed, &c.

(*Continuance.*)

And said action is continued to, &c.

(*Discontinuance as to one Defendant.*)

And the plaintiff discontinues his case so far as relates to the said N. F.

(*Notice to absent Defendant.*)

It appearing that the defendant in this case was without the State, so that no service of the writ in this action could be made on him, and that he had no agent or attorney residing in the State, it is ordered that notice be given, &c.

(*Death of party suggested.*)

It is suggested that the defendant hath deceased, and said action is continued, &c. that the plaintiff may summon in his administrator to defend.

(*Administrator comes in.*)

And now, on this, &c. A. B., administrator of the estate of said defendant, comes in and takes upon himself the trial of said suit.

(*Issue and Trial; Judgment for Plaintiff.*)

Said defendant for plea now saith, &c.; and of this puts himself on trial before said magistrate, by A. B. his attorney; and the plaintiff doth likewise by C. D. his attorney.

And upon the said issue, after hearing all the matters and things concerning the same, it appears to me that the said W. F. B. did promise, (or is guilty) in manner and form as the plaintiff hath thereof declared against him. It is therefore considered by me, the said justice, that the said B. S. F. recover of the said W. F. B. — for his debt or damage in that behalf sustained, and his costs of suit taxed at —; and execution is awarded therefor against the goods and effects of the said W. F. B., and for want thereof, against his body,

(Judgment against Executor, who appears.)

And execution is awarded for the said amount of debt or damage against the goods and estate of the said W. F. B. in the hands of the said A. B. as his executor. Execution is also awarded for the amount of the said costs against the proper goods and estate of the said A. B., and, for want thereof, against his body.

(Profert.)

The defendant now brings into court, and tenders to the plaintiff, the sum of — in full satisfaction of the cause of action declared on in the writ in this action, and prays that the costs of suit may be taxed as appears by the tender on file in the case. And said sum is accepted by the plaintiff, but only in part satisfaction.

(Appeal.)

From which said judgment against him the said W. F. B. appeals to the district court next to be holden, &c. and recognizes with sufficient sureties to prosecute his said appeal with effect, and pay all such costs as arise after the appeal.

Attest,

C. W. H., justice of the peace.

Here should follow on the record an attested copy of the original recognizance.

(Judgment and Appeal in Forcible Entry.)

And upon the issue, &c. it appears, &c. that the said W. F. B. is guilty, &c., and that the plaintiff is entitled to possession of the premises demanded in said writ. It is therefore considered by me, the said justice, that the said B. S. F., recover possession of said premises, and also his costs, &c. against the said W. F. B. From which said judgment, &c.

[If future rent be claimed, a statement may be put in at this stage of the case, unless claimed in the writ, which may be thus recorded.]

And thereupon the said B. S. F. makes a claim in writing, which is filed in the case, and is of the tenor following, &c.

Whereupon it is considered, &c., [setting forth the proper recognizance in such case.]

(Replevin of beasts ; Judgment for Return.)

And upon the issue, &c. it appears to me, &c. that the said beasts were lawfully taken and distrained.

It is therefore considered by me, the said justice, that the same beasts be returned and restored to the said W. F. B. to be held by him, irrepleviable by the plaintiff, and that the said W. F. B. recover, &c.

(Scire facias.)

In an action of scire facias, wherein the said B. S. F. sets forth, &c. [setting forth the writ] as appears more fully by the writ on file. And the plaintiff appears and enters his action. And the defendant appears by A. B., his attorney, and for plea, saith, &c. And the plaintiff doth likewise by his said attorney. [Hearing and judgment as before, according to the facts.]

CHAPTER II.

FORMS IN CRIMINAL PROCEEDINGS.

I. GENERAL FORMS.

1. *Complaint.*

STATE OF MAINE.

C—, ss.

To A. B., of —, Esq., one of the justices of the peace in and for the county of C—: C. D., of —, in said county, on the — day of —, in the year of our Lord one thousand eight hundred and fifty—, in behalf of said State, on oath complains, that [on, &c. at, &c. the following goods to wit; one silver watch of the value of twenty dollars, of the goods and chattels of the said C. D. then and there in the possession of the said C. D. being found, were feloniously taken, stolen and carried away, against the peace of the State, and contrary to the form of the statute in such cases made and provided; and the said C. D. hath probable cause to suspect and doth suspect that E. F. of, &c. did feloniously take, steal and carry away the goods and chattels aforesaid.]

[If the offence be within the final jurisdiction of the magistrate, instead of that between the brackets, insert as follows:]

That E. F. &c. heretofore, to wit; on, &c. at, &c. one silver watch of the value of five dollars of the goods and chattels of him the said C. D. then and there in the possession of said C. D. being found, feloniously did steal, &c. against the peace of the State and contrary to the form of the statute in such cases made and provided.

C. D.

C—, ss. On the — day of — aforesaid, the said C. D. makes oath, that the above complaint, by him signed, is true.

Before me,

A. B., justice of the peace.

2. *Warrant.*

STATE OF MAINE.

C—, ss. To the sheriff of our county of C—, or either of his deputies, or to any constable of the town of —, within said
[L. S.] county, Greeting.

Whereas C. D., of —, in said county, on the — day of —, A. D. 185—, in behalf of said State, on oath complained before me, one of the justices within and for said county, that [here describe as in the complaint.]

Therefore, in the name of said State, you are commanded to apprehend, forthwith, the said E. F., if he may be found in your precinct, and him bring before me, A. B., one of the justices of the peace for said county, or some other justice of the peace within and for said county, to answer to the complaint aforesaid. You are also alike commanded to summon the complainant and G. H. and J. S., as witnesses to appear and give evidence touching the matter of said complaint, when and where you have the said E. F.

Given under my hand and seal at — aforesaid, this — day of —, in the year of our Lord 185—. A. B., justice of the peace.

3. *Recognizance of a Party for further Examination.*

STATE OF MAINE.

C—, ss. Be it remembered that on the — day of, &c. E. F. of, &c. as principal, and J. M. and R. S. as sureties, personally appeared before me, A. B., Esquire, one of the justices of the peace for the said county of C—, and acknowledged themselves to be severally indebted to the State of Maine, in the sum of — dollars, to be levied on their goods or chattels, lands or tenements, and in want thereof upon their bodies, to the use of the said State, if default be made in the performance of the condition here under written.

The condition of the above written recognizance is such, that whereas, C. D. hath complained against said E. F., for that, &c. and a warrant has been duly issued thereon, and the said E. F., hath been brought before me on said warrant to answer said complaint, and I have this day adjourned the examination [or trial] of the said E. F., to, &c. at, &c.; now if the said E. F., shall personally appear before me at, &c. on, &c., then and there to answer to such matters and things as shall be objected against him on the behalf of said State, then the above written recognizance to be void and of none effect; otherwise to abide in full force, power and virtue.

Attest.

A. B. justice of the peace.

4. *Mittimus for not so Recognizing.*

STATE OF MAINE.

C—, ss. To the sheriff of the county of C—, his deputies, and the [L. S.] constables of the town of —, in said county, and the keeper of the common jail at —, in the county of C—, Greeting.

Whereas, E. F. of, &c. has been this day brought before me, A. B., one of the justices of the peace in and for said county, by virtue of a warrant issued against him on the complaint of C. D., who therein,

upon oath, says, that, &c. [setting out the complaint] and whereas I have adjourned the said examination of the said E. F. to, &c. at, &c. and have ordered the said E. F. to recognize in the sum of, &c. for his appearance at such time and place; and the said E. F. hath not so recognized. You, the said sheriffs and constables, are, therefore, hereby required, in the name of the State of Maine, to take the said E. F. and him carry to the jail for said county, and him deliver to the keeper thereof, together with this warrant. And the said keeper is alike required to receive the said E. F. into his custody in said jail, for want of sureties until the said day, &c. or until he be otherwise discharged by due course of law.

Given under my hand and seal at ——— &c. this ——— day of ——— in the year, &c. A. B. justice of the peace.

If the same officer who committed the party is required to bring him up, the order may be given verbally. If not, it should be in writing.

5. *Order for bringing the Prisoner up for further Examination.*

C—, ss. To the keeper of the State's jail in the said county of C—, Greeting.

You are hereby required, forthwith, to bring E. F., a prisoner in your custody, before me, the subscriber, one of the justices of the peace for the said county of C—, at my dwelling house, in said —; [or at my office, &c.] for further examination.

A. B. justice of the peace.

6. *Subpoena for Defendant's Witnesses.*

C—, ss. To J. K., of, &c. Greeting.

E. F., &c. brought before me on the complaint of C. D. having requested me to grant a summons for your attendance at his examination on said complaint:

You are hereby required, in the name of the State of Maine, upon payment of your legal fees, to make your appearance before me A. B., a justice, &c. at my office in —, in said county, forthwith, to give evidence of what you know relating to said complaint.

Hereof, fail not, as you will answer your default under the pains and penalties by law in that behalf made and provided.

Dated at —, aforesaid the — day of — in the year of our Lord, &c. A. B. justice of the peace.

7. *Capias for a Witness.*

STATE OF MAINE.

C—, ss. To the sheriff, &c. or to any constable, &c. Greeting.

[L. s.] Whereas E. F. has been brought before me, A. B., a justice &c. on the complaint of C. D., &c.; and whereas, at the request of

said C. D., I granted a summons to J. K. of, &c. requiring him to appear, &c.; and it has been made to appear to me that due service thereof has been made, and the fees of the said J. K. paid (or tendered) and the said J. K. hath not appeared, and hath thereby committed a contempt of this court. You are hereby required to take the body of the said J. K. (if he may be found in your precinct) and forthwith bring him before me, the said justice, to answer to the said charge of contempt, and to give evidence of what he knows relating to said complaint.

Hereof fail not, and make due return, &c.

Given, &c.

A. B. justice of the peace.

8. *Commitment of Witness for refusing to give Evidence.*

STATE OF MAINE.

C—, ss. To the keeper of the State's jail in —, &c.

Greeting.

[L. S.] Receive into your custody the body of J. K. herewith sent you, brought before me. A. B. Esquire, one of the justices, &c. For that he, the said J. K. having knowledge that a certain larceny was committed of the property of one C. D. on the — day of — last past, at, &c. and touching which the said J. K. can give material evidence, hath refused to be examined on oath respecting the same, the said J. K. therefore, you are safely to keep in your said custody, until he shall submit to be examined touching the said larceny, or shall be discharged by due course of law; and for so doing this shall be your sufficient warrant.

Given under my hand and seal this — day of — in the year of our Lord one thousand, &c.

A. B. justice of the peace.

9. *Examination of the Complainant.*

C—, ss. to wit. The information of C. D. of — in the said county, taken upon oath before me, A. B. Esquire, one of the justices &c. on the — day of — in the year, &c. in the presence and hearing of E. F., charged before me by C. D. of —, [state the offence as contained in the information or complaint] which said C. D. on his oath aforesaid, before me the said justice, in the presence and hearing of the said E. F. saith that [here state the evidence fully.]

Taken before me the day and year above mentioned.

A. B. justice of the peace.

10. *Examination of the Prisoner.*

C—, ss. to wit. The examination of E. F. of — taken before me one of the justices &c. on the — in the year, &c. the said E. F. being charged before me by C. D. of &c. he the said E. F. upon his exam-

ination now taken before me saith, that, [set forth the substance of prisoner's statement] E. F. [Prisoner's signature.]

Taken before me the day and year above mentioned.

A. B., justice of the peace.

11. *Record of an Order to Recognize.*

STATE OF MAINE.

C—, ss. At a court held before me, A. B., Esquire, one of the justices, &c. at my office in —, in said county, on this — day of —, in the year of our Lord one thousand eight hundred and —.

State, on complaint of C. D. vs. E. F.

The complaint, under oath, of C. D., shows that heretofore, to wit: on the — day of —, the following goods, to wit: one silver watch of the value of twenty dollars of the goods and chattels of the said C. D., then and there in the possession of the said C. D. being found, was feloniously taken, stolen, and carried away, against the peace of the State, and contrary to the form of the statute in such case made and provided, and the said C. D. had probable cause to suspect, and did suspect that E. F. of, &c. did feloniously take, steal, and carry away the goods and chattels aforesaid, as by complaint on file, dated, &c. more fully appears: Whereupon, it appearing that such an offence had been committed, a warrant was duly issued by me, the said justice, according to law.

On the — day of —, the said E. F. was brought before me, and said complaint was read to him, and, being asked whether he was guilty or not guilty, he then said he was not guilty, and the examination was thereupon adjourned to, &c. And the said E. F. recognized with sureties for such further examination (or was committed to prison for want of recognizance for, &c.)

On the — day of, &c. after hearing divers witnesses duly sworn to testify the whole truth, and fully understanding the defence of the respondent, and it thereupon appearing to me that there is probable ground to believe that the said E. F. is guilty of the offence charged upon him in said complaint, it is therefore considered and ordered by me the said justice that the said E. F. recognize to the State in the sum of — with sureties in the like sum, for the appearance of the said E. F. at the district court next to be held, &c. And the said E. F. enters into such recognizance (or the said E. F. not offering sufficient bail, is committed to prison for trial.)

A. B., justice of the peace.

12. *Bill of Costs.*

C—, ss.

State, on complaint of C. D. vs. E. F.

Before A. B., Esquire, a justice of the peace in and for said county, the — day of —, A. D., 185—.

Costs.

| | | |
|---|-----------|-----------|
| Receiving complaint and issuing warrant. | - | \$0 50 |
| Subpoena, | - - - - - | 0 10 |
| Travel to the place of trial, | - - - - - | - |
| Entry, swearing witnesses, Judg't, Recording, &c. | - | 0 75 |
| Trial, | - - - - - | 0 80—2.15 |
| Recognizances, | - - - - - | - |
| Mittimus, | - - - - - | 0 25 |
| Copies, | - - - - - | 1 00 |
| Travel in returning papers to court, | - - | - |

Witnesses.

| | | |
|-----------------------------|-------|-----------|
| G. H. four miles, one day, | - - - | 0 82 |
| J. S. eight miles, one day, | - - - | 1 14—1.96 |

Officers' Fees.

| | | |
|-------------------------------|-----------------------------|------|
| Service of Warrant, | - - - - - | 0 50 |
| Travel miles, | - - - - - | - |
| Summoning Witnesses, | - - - - - | - |
| Travel for do. | - - - - - | - |
| Conveyance of prisoner miles, | - - - | - |
| Attending court, 12 hours, | - - - | 0 75 |
| Aid—12 hours, | - - - | 1 00 |
| 6 hours, | - - - | 0 50 |
| Attest, | A. B. justice of the peace. | |

18. *Recognizance for appearance at the District Court.*

STATE OF MAINE.

C—, ss. Be it remembered, that on this — day of — A. D., 185—, E. F., G. H., and I. J., personally appeared before me, A. B., Esquire, one of the justices of the peace within and for the county of C—, and acknowledged themselves to be severally indebted to the State of Maine in the sums following, viz; the said E. F. as principal, in the sum of — dollars, and the said G. H., and I. J. as sureties for the said principal, in the like sum of — dollars, to be levied upon their goods, chattels, lands, or tenements; and in want thereof, upon their bodies, to the use of the said State, if default be made in the performance of the condition following:—to wit:

The condition of this recognizance is such that, whereas the said E. F. principal in this recognizance, is now before me, the said justice, arrested on a warrant issued upon the complaint of C. D. of — in said county, charging the said principal with [setting forth the complaint,] and whereas, after the examination of the evidence in support of said complaint, it appearing to me that there is probable cause to believe the said E. F. guilty, the said E. F. was thereupon ordered by me, the said justice, to recognize with sureties in the sum of —

dollars, for his personal appearance before the district court, to be holden at —, within and for the county of C—, on the — Monday of — to answer further to the aforesaid charge.

Now if the said E. F., shall personally appear at the district court to be holden at — within and for the county of — on the — Monday of —, then and there to answer to said charge, and shall abide the order of said court, and shall also in like manner personally appear at any subsequent term of said court, to which the same may be continued, if not previously surrendered and discharged, and so from term to term, until the final decree, sentence or order of the court thereon, and shall abide such final sentence, order or decree of the court, and not depart without leave, then this recognizance shall be void—otherwise shall remain in full force and virtue.

A. B., justice of the peace.

14. *Mittimus for not Recognizing.*

STATE OF MAINE.

C—, ss. To the sheriff of the said county of C—, or his deputy, [L. S.] or any constable of the town of —, in said county, and the keeper of the jail in our said county, Greeting.

Whereas E. F., of, &c. has been this day brought before me, A. B., one of the justices of the peace within and for said county, by virtue of a warrant issued against him, on the complaint of C. D., who therein, upon oath, says that [setting forth the complaint,] and whereas it appears to me, upon the testimony of the said C. D. and divers other persons, duly sworn to give testimony touching the premises, that there is probable cause to believe the said E. F. guilty of the charges alleged against him, as set forth in said complaint; for which offence it has been ordered by me, the said justice, that the said E. F. recognize, &c. and the said E. F. hath not so recognized, but fails and refuses to comply with said order. You, the said sheriffs and constables, are, therefore, hereby required to take the said E. F., and him deliver into the custody of the keeper of our said jail, together with this warrant. And the said keeper is alike required to receive the said E. F. into his custody, in said jail, and him there safely keep until he comply with said order, or be otherwise discharged by due course of law.

Given under my hand and seal, at —, aforesaid this — day of — in the year of our Lord one thousand eight hundred and

A. B., justice of the peace.

15. *Recognizance of Witnesses.*

STATE OF MAINE.

C—, ss. Be it remembered, that on the &c., in the year of our Lord one thousand eight hundred and —, G. H. and J. K., both of, &c.,

as principals, and R. S. and M. N. as sureties, all of —, in said county, personally appeared before me, A. B., Esquire, one of the justices of the peace for the said county of —, and acknowledged themselves to be jointly and severally indebted to the State of Maine in the sum of — dollars, to be levied on their goods or chattels, lands or tenements, and in want thereof upon their bodies, to the use of the said State, if default be made in the performance of the condition hereunder written.

The condition of the above-written recognizance is such, that if G. H. and J. K. shall personally appear before the justices of the district court next to be holden at —, within the said county of C—, on the — Monday of — next; then and there to testify on behalf of said State upon the complaint of one C. D., made upon oath before me the said justice, against one E. F., wherein said C. D. charges said E. F. with feloniously stealing, &c. their testimony having been deemed by me to be material, then the above written recognizance to be void and of none effect; otherwise to abide in full force, power and virtue.

A. B., justice of the peace.

16. *Commitment of witnesses for not Recognizing.*

STATE OF MAINE.

C—, ss. To the sheriff of the said county of C—, or his deputy, or any constable of the town of —, in said county, and the [L. S.] keeper of the jail in our said county, Greeting.

Whereas E. F. of —, is this day brought before me, one of the justices of the peace within and for said county, by virtue of a warrant issued against him, on the complaint of C. D., who therein, upon oath, says that [setting forth the complaint] on which said complaint the said E. F. has been ordered to recognize for his appearance at the district court, next to be holden, &c.; and whereas it appears to me, that the testimony of G. H. and J. K., &c. is material against the said E. F., and the said G. H. and J. K. have been ordered by me to recognize for their appearance at said term of court to testify on behalf of said State upon said complaint, and have refused so to do:

You are, therefore, hereby required to take the said G. H. and J. K., and them deliver into the custody of the keeper of our said jail, together with this warrant. And the said keeper is alike required to receive the said G. H. and J. K. into his custody, in said jail, and them there safely to keep until they comply with said order, or be otherwise discharged by due course of law.

Given under my hand and seal, at —, aforesaid, this — day of — in the year of our Lord one thousand eight hundred and —.

A. B. justice of the peace.

17. *Record of Conviction..*

STATE OF MAINE.

C—ss. At a court held before me, A. B., Esquire, one of the justices assigned to keep the peace within and for said county, at my office in —, in said county, on this — day of — in the year of our Lord one thousand eight hundred and —.

State, on complaint of C. D. vs. E. F.

The complaint under oath of C. D. shows that, heretofore, to wit; on, &c. at, &c. said C. D. one silver watch of the value of five dollars of the goods and chattels of him the said C. D., then and there in the possession of said C. D., being found, feloniously did take, steal and carry away, against the peace of the State, and contrary to the statute in such cases made and provided, as by complaint on file, dated, &c. more fully appears; whereupon, it appearing to my satisfaction that such an offence had been committed, a warrant was duly issued by me the said justice against the said E. F., according to law. On this — day aforesaid, the said E. F. is brought before me, and the said complaint is read to him: and being asked whether he is guilty or not guilty of the offence therein charged upon him, saith that he is not guilty, but after hearing divers witnesses duly sworn to testify the whole truth, and fully understanding the defence of said respondent, it is considered by me the said justice that he is guilty of the offence charged against him.

It is therefore ordered by me, the said justice, that he the said E. F. forfeit and pay the sum of — dollars, to and for the use of this State, and costs of prosecution taxed at, &c. and that he stand committed until this sentence be performed, from which said conviction the said E. F., appeals to the district court, next to be holden at —, in and for said county on, &c. and recognizes with sureties to appear at said term of court and there prosecute his appeal and abide the sentence of the court thereon, and in mean time to be of the peace and be of good behaviour, &c. [*as in No 18 below,*] [or is committed to abide said sentence until he shall recognize to the State in the sum of — with sureties to appear, &c.]

Attest,

A. B. justice of the peace.

18. *Recognizance for prosecuting an appeal.*

STATE OF MAINE.

C—, ss. Be it remembered that on the — day of — in the year of our Lord one thousand eight hundred and —, E. F., of &c. as principal, and G. H. and I. J. as sureties, personally appeared before me, A. B., Esquire, one of the justices of the peace for the said county of C—, and acknowledged themselves to be severally indebted to the State of Maine in the sums following, viz. the said E. F., as principal, in the sum of — dollars, and the said G. H., and I. J., as

sureties in the sum of — dollars, to be levied on their goods or chattels, lands or tenements, and in want thereof upon their bodies, to the use of the said State, if default be made in the performance of the condition hereunder written.

The condition of the above recognizance is such, that whereas the said E. F., has been this day brought before me, A. B., a justice, &c. on complaint of C. D., of, &c. for [setting forth the complaint,] and has been convicted thereof, and has appealed from said conviction to the district court next to be holden at, &c., and has been ordered to recognize according to law, now if the said E. F., shall personally appear at said term of court, and there prosecute his appeal, and abide the sentence of the court thereon, and in the mean time keep the peace, and be of good behaviour, and in like manner personally appear at any subsequent term of said court to which the same may be continued, if not previously summoned and discharged, and so from term to term, until the final decree, sentence or order of the court thereon, and shall abide such final sentence, order or decree of the court, and not depart without leave, then this recognizance shall be void. Otherwise shall remain in full force and virtue.

A. B. justice of the peace.

19. *Mittimus for not furnishing Recognizance for an Appeal.*

STATE OF MAINE.

C—, ss. To the sheriff of our county of C—, his deputies, the constables of the town of —, and the keeper of the jail in
[L. s.] our said county, Greeting.

These are in the name of the State of Maine, to command you, the said sheriff, deputies, constables, and each of you, forthwith to convey and deliver into the custody of the keeper of our said jail, the body of E. F., of —, in our county of C—, brought before me one of the justices of the peace within and for said county of C—, on the — day of —, in the year of our Lord one thousand eight hundred and —, on the complaint of C. D., of —, who on his oath complains, that [setting forth the complaint] and after hearing the testimony in support of said complaint, and the defence of the said E. F., it was considered and ordered by me the said justice, that the said E. F. forfeit and pay [setting forth the conviction] from which decision the said E. F. claims an appeal to the district court, next to be holden at —, within and for the county of C—, on the — Tuesday of — next; and the said — was ordered by me the said justice to recognize in the sum of — hundred dollars, with sufficient sureties in the like sum, to appear at said court and prosecute his appeal, and abide the sentence of the court thereon, and in the mean time to keep the peace and be of good behaviour, and in like manner personally to appear at any subsequent term of said court to which he same may be continued, if not previously surrendered and discharged, and so from

term to term, until the final decree, sentence or order of the court thereon, and to abide such final sentence, order or decree of the court, and not depart without leave; with which said order the said E. F. fails, and refuses to comply. And you, the keeper of said jail, in the name of the State aforesaid, are hereby required to receive the said E. F. into your custody in said jail, and him there safely to keep until he shall so recognize with sureties as aforesaid, or be otherwise discharged in due course of law. Hereof fail not at your peril.

Given under my hand and seal this — day of — in the year of our Lord one thousand eight hundred and —.

A. B., justice of the peace.

20. *Commitment to jail on Conviction, for Non-payment of Fine and Costs.*

STATE OF MAINE.

C—, ss. To the sheriff of the county of C—, his deputies, the constables of the town of — and to the keeper of the jail in our said county, Greeting.

Whereas, E. F., of, &c. in our county of C—, now stands convicted before me, A. B., one the justices of the peace in and for the county of C—, on the complaint of C. D., of, &c. in said county, who on his oath complains that [setting forth the complaint] against the peace of the State, and contrary to the form of the statute in such cases made and provided, for which offence, he, the said E. F., is sentenced by me, the said justice, to pay a fine to the use of the State aforesaid, of — dollars, and costs of prosecution, taxed at — dollars and — cents, and to stand committed until this sentence be performed; all which sentence the said E. F., now before me, the said justice, fails and refuses to comply with and perform.

These are, therefore, in the name of the State of Maine, to command you, the said sheriff, deputies, and constables, and each of you, forthwith to convey the said E. F. to the common jail in —, in the county aforesaid, and to deliver him to the keeper thereof, together with this precept. And you, the keeper of said jail at — aforesaid, are hereby in like manner commanded in the name of the State aforesaid, to receive the said E. F. into your custody in said jail, and him there safely to keep, until he shall comply with said sentence, or be otherwise discharged by due course of law.

Given under my hand and seal, this — day of — in the year of our Lord one thousand eight hundred and —.

A. B., justice of the peace.

21. *Common Form of the Mittimus for Commitment to the House of Correction.*

STATE OF MAINE.

C—, ss. To the sheriff of our county of C—, his deputies, the constables of the town of —, and the keeper of the house of [L. s.] correction at — in said county, Greeting.

We command you, the said sheriff, deputies, constables, and each of you, forthwith to convey and deliver into the custody of the master of said house of correction, the body of E. F. of —, in our county of C—, who stands convicted before me, A. B., Esquire, one of the justices of the peace within and for the county of C—, on the complaint of C. D., who on his oath complains that [setting forth the complaint.]

For which offence the said E. F. is sentenced by me, said justice, to be committed to the house of correction, situated in said —, there to be put to hard labor, according to the rules of the same, for the term of —, from and after this — day of —; and make return on this precept of your doings thereon.

And you, the said keeper, in the name of the State aforesaid, are hereby commanded to receive the said E. F. into your custody in our said house of correction, and him therein safely to hold, employ and keep at work until the expiration of said —, or he be otherwise discharged in due course of law. Hereof fail not at your peril.

Given under my hand and seal, this — day of —, in the year of our Lord one thousand eight hundred and —.

A. B. justice of the peace.

22. *Commitment to the House of Correction for failing to comply with an Order of Court.*

STATE OF MAINE.

C—, ss. To the sheriff of our county of C—, his deputies, the constables of the town of —, and the keeper of the house of [L. s.] correction at — in our said county, Greeting.

These are, in the name of the State of Maine, to command you, the said sheriff, deputies, constables, and each of you, forthwith to convey and deliver into the custody of the keeper of our house of correction at —, in said county, the body of E. F., of —, in our county of C—, brought before me, A. B., one of the justices of the peace within and for said county of C—, on the — day of —, in the year of our Lord one thousand eight hundred and —, on the complaint of —, of —, who on his oath complains, that [setting forth the complaint] against the peace of the State, and contrary to the form of the statute in such cases made and provided; and after due examination, the said defendant was ordered by me, the said justice,

&c., and in default of so doing that the said defendant stand committed to the house of correction at —, aforesaid, until he comply with said order, or be otherwise discharged according to law. With which said order the said defendant fails and refuses to comply.

And you, the keeper of the house of correction at —, in said county, in the name of the State aforesaid, are hereby commanded to receive the said defendant into your custody in our said house of correction, and him there safely to keep until he shall comply with said order, or be otherwise discharged in due course of law. Hereof fail not at your peril.

Given under my hand and seal, at — aforesaid, this — day of — in the year of our Lord one thousand eight hundred and —.

A. B., justice of the peace.

23. *Commitment for not Finding Sureties for keeping the Peace.*

STATE OF MAINE.

C—, ss. To the sheriff of our county of C—, his deputies, the [L. s.] constables of the town of —, and the keeper of the house of correction at —, in our said county, Greeting.

Whereas E. F. of —, in the county of C—, by virtue of a warrant issued by me, A. B., one of the justices of the peace, within and for the county of C—, on the complaint of —, who on his oath complains that [setting forth the complaint] upon which complaint the said defendant has this day been brought before me, the said justice; and after a hearing in the premises, I have ordered him, the said E. F., to find sufficient surety to be bound with him in a recognizance to keep the peace, and be of good behaviour towards all persons within said State, and especially towards the said — for the term of — from and after this — day of —, and also to pay a fine of — dollars for the use of the State, and costs of prosecution, taxed at — dollars and — cents; And whereas he, the said — hath failed and refused, and doth now, before me said justice, fail and refuse to recognize himself as aforesaid, and to find such sureties, to wit, the said — as principal, in the sum of — dollars, with — sufficient sureties in another sum of — dollars, and to pay said fine and costs, as now required by me, the said justice.

These are, therefore, in the name of the State of Maine to command you, the said sheriff, deputies and constables and each of you, forthwith to convey the said E. F. to the house of correction at —, in our county aforesaid, and to deliver him to the keeper thereof: And make return on this precept of your doings therein. And you, the said keeper, in the name of the State aforesaid, are hereby commanded to receive the said E. F. into your custody in our house of correction, and him there safely to keep according to law, until he shall find such

sureties as aforesaid, and pay said fine and costs, or be otherwise discharged in due course of law.

Given under my hand and seal at —, this — day of — in the year, &c. A. B. justice of the peace.

24. *Commitment by a Justice, on view, for insulting him in the execution of his office.*

STATE OF MAINE.

C—, ss. To the keeper of the jail in —, &c.

Greeting.

[L. s.] Receive into your custody the body of E. F. herewith sent you by me, A. B., a justice, &c., and charged by me, the said justice, upon view of me, the said A. B., Esquire, one of the justices, &c. for indecent behavior, by insulting me, and obstructing me in the due and lawful execution of my office as a magistrate as aforesaid, against the peace of said State. Him, the said E. F., therefore safely keep in your custody for want of sureties, or until he shall be discharged by due course of law; and for so doing this shall be your sufficient warrant.

Given under my hand and seal this — day of — in the year of our Lord one thousand, &c. A. B. justice of the peace.

25. *Complaint for an offence committed within another State, and for which the Party is liable to be delivered to the Executive of that State.*

STATE OF MAINE.

C—, ss. To A. B., Esquire, one of the justices of the peace in and for the county of C—; C. D. of, &c. in said county, on oath, complains that heretofore, to wit, on, &c., at the city of New York within the State of New York, &c. [setting forth the offence in technical language] and the said C. D. hath probable cause to suspect, and doth suspect that E. F., of, &c. did, &c.; and the said C. D. further shows that the said E. F. is now found within this State, to wit, at —, in said county of C—, and is liable, by the constitution and laws of the United States, to be delivered over upon the demand of the executive of the said State of New York.

Wherefore the said C. D. prays that he the said E. F. may be apprehended, and held to answer to this complaint, and further dealt with, relative to the same, according to law. C. D.

C—, ss. Received and sworn to, on the — day of —, A. D. 185—. Before me, A. B., justice of the peace.

26. *Warrant on the above Complaint.*

STATE OF MAINE.

C—, ss. To the sheriff of said county, or his deputy, or to either of the constables of the town of —, in said county, [L. s.] Greeting.

You are hereby required, in the name of the State of Maine; forthwith to apprehend E. F., (if he may be found in your precinct) and him bring before me, A. B., Esquire, one of the justices of the peace within and for said county, or some other justice of the peace in and for said county, to answer to the complaint of C. D. of, &c., who on oath complains, &c., and to be further dealt with according to law. You are also required to summon the complainant, and G. H. and J. S., as witnesses, to appear and give evidence touching the matter contained in the above complaint, when and where you have the said E. F. Given, &c.

27. *Recognizance for future appearance of such person.*

[The penal part of the recognizance is the same as in other recognizances. The condition as follows:]

The condition of this recognizance is such that, whereas the said E. F. is this day brought before me, A. B., a justice, &c. by virtue of a warrant duly issued on the complaint of C. D. of, &c., who on oath complains that, &c. [setting forth the complaint] and it appears to me that there is reasonable cause to believe that said complaint is true, and the said E. F. has been ordered to recognize for his appearance before me on the, &c. at my office in —.

Now if the said E. F. shall personally appear at said office on the said — day of — to answer said complaint, and abide the order of court thereon, then this recognizance shall be void; otherwise shall remain in full force and virtue.

Attest,

A. B., justice of the peace.

28. *Mittimus for not so Recognizing.*

STATE OF MAINE.

C—, ss. To the sheriff of the said county of C—, or his deputy, [L. s.] or any constable of the town of —, in said county, and the keeper of the jail in our said county, Greeting.

Whereas E. F., of, &c. has been this day brought before me, A. B., one of the justices of the peace within and for said county, by virtue of a warrant issued against him, on the complaint of C. D., who therein, upon oath, says that [setting forth the complaint,] and it appears to me, that there is reasonable cause to believe that said complaint is true, and the said E. F. has been ordered to recognize with sureties for his appearance before me, at my office in —, on, &c., and has not so recognized, but fails and refuses to comply with said order.

You, the said sheriffs and constables, are, therefore, hereby required in the name of the State of Maine, to take the said E. F., and him carry to the said jail, and deliver to the keeper thereof, together with this warrant. And the said keeper is alike required to receive the said E. F. into his custody, in said jail, and him safely keep till the

said day, unless he shall before then recognize as aforesaid, or until he be otherwise discharged by due course of law.

Given under my hand and seal at —, this — day of —, in the year of our Lord one thousand eight hundred and —.

A. B., justice of the peace.

29. *Recognizance of a Party remanded to Jail after a Petition for a Writ of Habeas Corpus.*

[The penal part of the recognizance the same as in other recognizances. The condition as follows:]

The condition of this recognizance is such, that whereas [setting forth the complaint and the commitment after some one of the foregoing forms, according to the facts,] and whereas, afterwards, to wit, — on the complaint of —, a writ of habeas corpus was duly issued by the Hon. E. S. one of the justices of the supreme judicial court, and such further proceedings had thereon, that the said E. F. was afterwards, to wit, &c. remanded to prison, with an order of said justice that if the said E. F. should recognize in the sum of — dollars for his appearance at the district court next to be holden, &c. then he should be admitted to bail.

Now if the said E. F. shall personally appear at the said term of court then and there to answer to said charge, and shall abide the order of said court, &c. [as in No. 13.] then this recognizance shall be void; otherwise shall remain in full force and virtue.

A. B. justice of the peace.

30. *Recognizance to be taken before two Justices of the Peace.*

[The penal part of the recognizance as before.]

The condition of this recognizance is such that, whereas the said E. F. [reciting the fact, cause, and mode of the commitment in the manner expressed in the foregoing forms] and the said E. F. has made application to us, A. B. and C. D., each a justice of the peace and of the quorum in and for said county of C—, to be admitted to bail, and we have inquired into the case. Now, if the said E. F. shall, &c. [making the condition to conform to the provisions of the statute, according the nature of the offence and the cause of commitment,] then this recognizance shall be void; otherwise, &c.

——, } Justices of the peace
——, } and quorum.

II. FORMS AND PRECEDENTS FOR COMPLAINTS OF OFFENCES WITHIN THE FINAL JURISDICTION OF A JUSTICE OF THE PEACE.

Following out our original division of this subject, we shall next take into consideration the forms for complaints of offences within the final jurisdiction of a justice of the peace.

I. ASSAULT AND BATTERY.

An assault is an attempt or offer, with force and violence, to do bodily injury to another, without authority or justification of law; as by striking at another with a stick or other weapon, or without any weapon, though the party striking misses his aim. So, drawing a sword or bayonet, or even holding up a fist in a menacing manner; throwing a bottle or glass with intent to wound or strike; presenting a gun at a person who is within the distance to which the gun will carry; pointing a pitchfork at a person who is within reach, or any other similar act accompanied with such circumstances as denote at the time an intention, coupled with a present ability, of using actual violence against the person of another, will amount to an assault. But no words whatsoever, be they ever so provoking, can amount to an assault.¹

A battery is more than an attempt. A bodily injury, however slight, being maliciously and forcibly done, is a battery and an assault and battery; as, by striking another; spitting in another's face; touching another or taking hold of his garment in a rude and angry or menacing manner; striking at another and hitting his garment or the cane in his hand; exposing another to the inclemency of the weather. So an assault and battery may be made indirectly; as by inciting and thus causing a dog to bite another; riding over another; wilfully driving a vehicle against that of another, and thereby causing bodily injury to him; throwing a lighted squib into a place of public resort, where, being tossed from hand to hand, it finally hits and hurts another; wilfully pushing a drunken man against another; wilfully or unnecessarily, and with wanton negligence or recklessness of the safety of others, striking a horse, and thereby causing him to run against others.²

¹Russell on Crimes, 604.

²Met. 24.

An assault and battery is really but one crime. The latter includes the former. A person may be convicted of the former, and acquitted of the latter, but not *vice versa*. They must therefore be charged as one offence.¹

The intention with which an act is done is material in the inquiry whether it will amount to an assault. Thus, to lay one's hand gently on another whom an officer has a warrant to arrest, and to tell the officer that this is the man he wants, is said to be no battery. And if the injury committed were accidental and undesigned, it will not amount to a battery.²

Forcible injury to the person may be justified when done by authority of law; in self defence against illegal violence; in defence of one's property or right against an illegal invasion of the same; or in due defence of a third person, or of his property or right, at his request, or with his consent. But, in all these cases, the force used must be reasonable, proportionate to the occasion, under the circumstances authorized by law, and not continued after the cause for it has ceased.

The authority to protect one's goods by force extends against officers claiming them as the property of another, as well as against persons not officers. Thus, if an officer would take goods belonging to A., and in A.'s possession, upon a writ against B., A. may maintain his possession by force, in the same manner as he might against any trespasser who is not an officer.³

It should be observed, with respect to an assault by a man on a party endeavoring to dispossess him of his land, that where the injury is a mere breach of a close, in contemplation of law, the defendant cannot justify a battery without a request to depart; but it is otherwise where any actual violence is committed, as it is lawful in such case to oppose force to force.⁴

As the kind and degree of force proper to remove a trespasser, must depend on the conduct of the trespasser in each particular case, the question whether it was suitable and moderate, in any particular case, is entirely a question of fact.⁵

¹ 20 Pick. 361.

² 1 Russell on Crimes' 607.

³ 8 Pick. 132.

⁴ Russell on Crimes, 609—Met. 25.

⁵ Met. 25.

Assaults are either 1st. aggravated; or 2d. not aggravated. An aggravated assault is an offence beyond the final jurisdiction of a justice of the peace. An assault may or may not be aggravated, in the discretion of the magistrate, judging from the circumstances attending its commission. The following assaults are clearly aggravated assaults: A deliberate, malicious assault and battery, or either, with intent to commit, or compel another to commit a felony; or with intent to maim, or disfigure, or mutilate another; or to destroy or disable any limb, member, or bodily organ of another; a deliberate and malicious assault and battery, or either, with a weapon obviously and imminently dangerous to life; where, in either of the cases aforesaid, the person assaulted shall be thereby maimed, mutilated, or disfigured in his person, or shall suffer the loss of, or be disabled in, or lose wholly or partially the use of limb, member, or bodily organ; and also an assault, or assault and battery on any public officer, civil, judicial, or military, with intent to resist, prevent, hinder, or obstruct him in the discharge or execution of his duty as such.

This catalogue rather shows the species of offences which are aggravated than enumerates them all. The peculiar circumstances of aggravation attending each case are to be weighed by the magistrate in forming his decision of the disposition to be made of the prisoner.

1. *Common Assault without a Battery.*

A. B., of C—, in the county of C—, yeoman, upon his oath complains, that C. D. of C—, in the county of C—, laborer, on the third day of May now last past, with force and arms, at C—, aforesaid, in the county aforesaid, in and upon him the said A. B., in the peace of the said State then and there being, with a certain offensive weapon, which he the said C. D. in his right hand then and there had and held, called a cane, did make an assault; and other wrongs to the said A. B. then and there did and committed, to the great injury of him the said A. B., and against the peace and dignity of the State aforesaid, and contrary to the statute, &c. [Conclusion as in the general form.]

2. *Common Assault and Battery.*

A. B. on oath complains that C. D. of C—, in the county of C—, laborer, on the third day of May in the year, &c. with force and arms, at C—, aforesaid, in the county aforesaid, in and upon one J. N. in the peace of the State then and there being, did make an assault, and

him the said J. N. then and there did beat, wound and ill treat, and other wrongs to the said J. N. then and there did, to the great damage of the said J. N. and against the peace and dignity of the State aforesaid, &c. [If the assault were committed under circumstances of aggravation, state them.]

3. *An Assault by casting a person on a brick floor and kicking him.*

C. D. on, &c. with force and arms, at &c. aforesaid, in and upon the said A. B. in the peace of said State then and there being, did make an assault, and him the said A. B. then and there did beat, bruise, wound, and ill-treat, so that his life was greatly despaired of; and the said C. D., with both his hands, then and there violently cast, flung, and threw the said A. B. to, upon and against a certain brick floor there, and him the said A. B., in and upon his head, neck, breast, back, sides, and other parts of his body, with both the feet of him the said C. D., then and there violently and grievously did kick, strike and beat, giving the said A. B., then and there, as well by such flinging, casting and throwing of him the said A. B., as also by such kicking, striking and beating of the said A. B., as aforesaid, in and upon the head, neck, breast, back, sides, and other parts of the body of him the said A. B., divers bruises, hurts and wounds, and other wrongs, &c.

4. *An Assault and beating out an Eye.*

That C. D. of &c. on, &c. with force and arms, at, &c. in and upon A. B. in the peace of the State then and there being, violently did make an assault, and him the said A. B. then and there did beat, wound, and ill-treat, so that his life was greatly despaired of; And that he, the said C. D., with his right hand the said A. B. in and upon the left eye of him the said A. B. then and there unlawfully, violently and maliciously did strike, by means whereof the said A. B. then and there the use, sight, and benefit of his said left eye entirely lost, and was deprived of, and also by means of the premises, he the said A. B. became sick, weak, languid and distempered, and remained so sick, weak, languid and distempered, for a long time, to wit, — hitherto; and other wrongs to the said A. B., then and there violently and maliciously did, to the great damage of the said A. B., against the peace, &c.

5. *For Assault and encouraging a Dog to bite.*

That C. D., of, &c. on, &c. with force and arms, at —, aforesaid, did unlawfully incite, provoke and encourage a certain dog, of and belonging to the said C. D., to bite him the said A. B., by means

whereof the same dog did then and there grievously bite the said A. B., in and upon the right leg of him the said A. B., and the said leg of him, the said A. B., was thereby then and there grievously hurt and wounded, to the great damage of the said A. B., and against the peace, &c.

6. *For riding over a Person with a Horse.*

That C. D., of, &c. in, &c. with force and arms, at, &c. in and upon one A. B., in the peace of the State then and there being, did make an assault, and then and there unlawfully and maliciously, and with great force and violence, rode and drove a certain horse against, upon, and over the said A. B., and thereby then and there greatly bruised, wounded, and ill-treated him, insomuch that his life was then and there greatly despaired of, and other wrongs, &c.

7. *For Assault, and presenting a loaded Gun and threatening to fire it.*

That C. D., of, &c. on, &c. with force and arms, to wit, guns, swords, staves and fists, at, &c. in and upon one A. B., in the peace of the State then and there being, did make an assault, and him the said A. B., then and there did beat, wound, and ill-treat, so that his life was thereby then and there greatly despaired of, and then and there levelled and pointed at the said A. B., a certain gun, which he said C. D. then and there held in his hand loaded, to wit; with gunpowder and lead balls, and then and there with the said gun, so levelled and pointed at the said A. B. to shoot the said A. B. and then and there, by means of the premises aforesaid, greatly terrified and affrighted the said A. B., and then and there did, &c.

8. *For driving a cart against a chaise and throwing the Driver from the chaise, and for Assault and Battery.*

That C. D. of, &c. on, &c. with force and arms, at &c. in the public highway there, unlawfully, wilfully, and violently, did drive and force a certain horse and cart, under the care and guidance of him, the said C. D. to, at, and against a certain chaise drawn by two horses, under the care of one A. B., by means whereof the said A. B., was then and there thrown from and off the said chaise, to and against the ground, and was thereby put in great peril and danger of his life, and other wrongs, &c. to the damage, &c. and against the peace, &c.

9. *For Assault and false imprisonment.*

A. B., of —, in the county of C—, yeoman, upon his oath complains, that C. D. of, &c. on &c. with force and arms, at, &c.,

in and upon the body of him, the said A. B., in the peace of the State then and there being, an assault did make, and him the said A. B. did then and there beat, wound, and abuse; and him, the said A. B. then and there, against his will, and without his consent, unlawfully, without any warrant, or justifiable cause whatever, did in prison detain and hold in duress for the space of three days then next following; and other wrongs to the said A. B. then and there did and committed, to the great damage of him the said A. B. and against the peace of the State, &c.

10. *For an Assault with a Cane.*

A. B. of, &c. upon his oath complains that C. D. of, &c. on, &c. with force and arms, at, &c. in and upon the body of the said A. B. in the peace of said State then and there being, did make an assault, and him the said A. B. with a large cane, which the said C. D. then and there, in his right hand had and held, did strike divers, grievous and dangerous blows upon the head, back, shoulders, and other parts of the body of him the said A. B., whereby the said A. B. was cruelly and dangerously beaten, bruised, and wounded, and his life greatly endangered; and other wrongs to the said A. B. then and there did and committed, to the great damage of him, the said A. B., against the peace of the State aforesaid, &c.

11. *For an Assault upon a Constable in execution of his office.*

A. B. of, &c. in, &c. upon his oath complains, that C. D. of, &c. in, &c. on, &c., with force and arms, at, &c. in, &c. in and upon the body of him the said A. B., he being then and there one of the constables of the said town of C—, legally authorized and duly qualified to discharge and perform the duties of said office, and being then and there in the due and lawful execution of the same, and also being then and there in the peace of said State, did make an assault, and him, the said A. B., did then and there beat, wound, and ill-treat, and in the due and lawful execution of his said office, did then and there unlawfully obstruct, hinder and oppose; and other wrongs to the said A. B. then and there did, to the great damage of him, the said A. B., and against the peace and dignity of the State aforesaid, &c.

12. *For an assault upon a Woman quick with child.*

A. F. the wife of E. F. of, &c. upon her oath complains that C. D. of, &c. in &c. yeoman, on, &c. with force and arms, at, &c. in, &c. in and upon her the said A. F. in the peace of the said State then and there being, and also being then and there pregnant with a quick child, did make an assault and her the said A. F. did then and there, beat, wound, and abuse, so that her life thereby was greatly

endangered; by reason whereof she, the said A. F., afterwards, to wit, on the &c. in the same month of, at, &c. did bring forth the said child, dead, and other wrongs to the said A. F. then and there did, to the great injury of her the said A. F., and against the peace and dignity of the State aforesaid, &c.

13. *Assault with Intent to Murder.*

That C. D. of, &c. on, &c. with force and arms at, &c. in &c. in and upon one A. B., in the peace of the said State then and there being, did make an assault, and him the said A. B. then and there did beat, wound and ill treat, and one brass candlestick at, towards, and against the said A. B. then and there did cast and throw with intention to strike, bruise, wound, and hurt the said A. B. with the said candlestick; and the said C. D. then and there, with force and arms, with a certain chair, did strike the said A. B., divers terrible, grievous and dangerous blows upon the head, arms, sides, back, and other parts of the body of him the said A. B. and thereby grievously cut, bruised, and wounded the said A. B. in and upon his head, arms, sides, back, and other parts of his body, insomuch that his life was greatly despaired of, with intent, him the said A. B. then and there feloniously, wilfully, and of his malice aforethought, to kill and murder, and other wrongs, &c.

14. *For an assault, and casting in a Pond of Water with intent to suffocate.*

That C. D. of, &c. on, &c. with force and arms at, &c. in and upon one A. B. in the peace of the said State then and there being, did make an assault, and him the said A. B. then and there did beat, bruise, wound and ill treat, so that his life was greatly despaired of, and that the said C. D. with a certain large stick, then and there gave and struck the said A. B. many violent and grievous blows and strokes in and upon his head, neck, arms, breast, and other parts of his body, and did with both the hands of him, the said C. D., then and there unlawfully, wickedly, maliciously, and violently, cast, push, fling, and throw the said A. B. into a certain pond there situated and being, wherein there was a large quantity of filthy water and mud, and did then and there keep, press down, and confine the said A. B., in and under the said water and mud for the space of five minutes then next following, with intention him, the said A. B., then and there feloniously, wilfully and of his malice aforethought, to suffocate and drown in the said water and mud, and him the said A. B., by means thereof to murder; by means of which said casting, pushing, flinging, and throwing of him the said A. B. into the said pond, as aforesaid, and keeping, pressing down, and confining the said A. B. in and under the said water and mud as aforesaid, he, the said A. B., was then and

there grievously hurt and bruised in his body, and in great danger of being suffocated in the said water and mud there, and other wrongs, &c.

15. *For an assault with intent to maim.*

A. B. of, &c. on, &c. yeoman, upon his oath complains that C. D. of, &c. in, &c. on, &c. with force and arms, at, &c. in, &c. in and upon the body of him the said A. B., in the peace of the said State then and there being, and being then and there armed with a certain dangerous weapon called a knife, which he the said C. D. in his right hand then and there held, did make an assault, with an intention him the said A. B., with set purpose and aforethought malice, unlawfully to maim and disfigure, by unlawfully cutting off the right ear of him the said A. B.; and other wrongs to the said A. B. then and there did, to the great injury of him, the said A. B., against the peace of the said State, and contrary to the form of the statute in such case made and provided, &c.

16. *For an assault for not providing sufficient food for servants of tender age.*

That E. R., the wife of S. R. unlawfully and maliciously contriving and intending to hurt and injure one E. G., being a servant to her the said E. R. and an infant under ten years, to wit, of the age of nine years, and under the control of the said E. R. heretofore, to wit, on, &c. and on divers other days and times, as well before as after that day, with force and arms, at, &c. unlawfully, wilfully and maliciously, did omit, neglect, and refuse to provide for, and give and administer to the said E. G., sufficient meat and drink necessary for the sustenance, support, and nourishment of the body of her, the said E. G., and did then and there expose the said E. G. to the cold and inclemency of the weather, as well within as without the house wherein she the said E. R. then dwelt, and kept the said E. G. without sufficient and proper warmth necessary for the health of her, the said E. G., to wit, at, &c. contrary to the duty of her, the said E. R., as the mistress of the said E. G.; by reason of all which premises, she the said E. G. afterwards to wit, in, &c. became, and was, and for a long time, to wit, the space of six months then next following, continued to be very sick, and ill, and greatly consumed, and emaciated in her body, to wit, at, &c. aforesaid, to the great damage of the said E. G. and in contempt, &c. to the evil example, &c. and against the peace, &c.

17. *Assault on Highway, and defacing garments and clothes.*

That C. D. of, &c. heretofore to wit: on, &c. at, &c. in a public street and highway there called —, in and upon one A. B., yeoman, in the peace of the said State then and there being, and in the said

public street and highway, then and there being, wilfully, maliciously and feloniously did make an assault with an intent wilfully and maliciously to tear, spoil, cut and deface the garments and clothes of him the said A. B. and with force and arms, did, in the said public street and highway, then and there, wilfully, maliciously, and feloniously tear, spoil, cut, and deface, one printed linen coat, of the value of five dollars, of the goods and chattels of the said A. B., being part of the garments and clothes of him the said A. B. on his person, then and there in wear, to the great damage, &c. and against the peace, &c.

18. *Assault with intent to commit a rape.*

A. B. of, &c. in, &c., single woman and spinster, upon her oath complains, that C. D. of, &c. in, &c. yeoman, heretofore, to wit, on, &c. with force and arms, at, &c. in, &c. in and upon her, the said A. B., in the peace of said State then and there being, did make an assault, with the intent her, the said A. B., then and there, feloniously to ravish and carnally know, by force, and against her will; against the peace of said State, and contrary to the form of the statute in such case made and provided.

19. *Assault, with intent carnally to know and abuse a female child under the age of ten years.*

A. B., of, &c. in, &c. upon his oath complains, that C. D. of, &c. in, &c. laborer, heretofore, to wit, on, &c. with force and arms, at, &c. in, &c. in and upon one E. F., spinster, a female child under the age of ten years, to wit, of the age of eight years, in the peace of the said State then and there being, did make an assault, with intent her the said E. F. wickedly and feloniously, to carnally know and abuse, against the peace of said State, and contrary, &c.

20. *Assault by two persons upon a woman, with intent that one of them should ravish her.*

E. F. of, &c. in, &c. spinster, upon her oath complains that C. D. and G. H. both of, &c. in, &c. heretofore, to wit, on, &c. with force and arms, at, &c. in, &c. in and upon her the said E. F., in the peace of the said State then and there being, did make an assault, with intent that he the said C. D. should then and there, feloniously ravish and carnally know her the said E. F., by force and against her will, against the peace, &c. and contrary to the form, &c.

21. *Assault with intent to rob.*

E. F. of, &c. in, &c. gentleman, upon his oath complains, that C. D. of, &c. in, &c. laborer, heretofore, to wit, on, &c. at, &c. with force and arms, in and upon the body of him, the said E. F., in the

peace of the said State then and there being, with a certain dangerous weapon called a pistol, then and there loaded with gunpowder and leaden bullets, with which he, the said C. D. was then and there armed, and which he, the said C. D. in his right hand then and there had and held, and also with other actual violence, did make an assault with intent the monies, goods, and chattels of him, the said E. F. from the person, and against the will of him, the said E. F. feloniously and by force and violence, and by assault and putting him in bodily fear and danger of his life, to steal, take, and rob, against the peace, &c. and contrary to the form, &c.

22. *Assault with intent to steal.*

E. F. of, &c. in, &c. upon his oath complains, that C. D. of, &c. laborer, heretofore, to wit; on, &c. with force and arms, at, &c. in and upon the body of him, the said E. F. in the peace of the said State then and there being, with a dangerous weapon, to wit, with a pistol, did make an assault, with intent, the goods, chattels, and monies of him the said E. F. from the person of him, the said E. F. openly and violently [or privily and fraudulently, as the case may be] to steal, take, and carry away, against the peace, &c. and contrary to the form, &c.

II. AFFRAYS, BREACHES OF THE PEACE, &c.

An affray is the fighting of two or more persons, to the terror of the people, and may be sudden and unpremeditated, in which the parties concerned have no common purpose.

It is essential to constitute affrays, or breaches of the peace, that the acts done should be injurious to the public peace.¹ In this they are to be distinguished from assaults, false imprisonment, and the like, which only affect a private individual. So, too, these offences differ from riots, because riots presuppose a mutual design on the part of all the rioters, and a tumultuous and violent manifestation or execution of their purpose.² But a breach of the peace may be without concert on the part of the offenders, and without any tumultuous violence.

It is said that no quarrelsome or threatening words whatsoever can amount to an affray; and that no one can justify laying his hands on those who shall barely quarrel with angry words without coming to blows; but it seems that a constable may, at the request of the party

¹2 Ch. Cr. L. 485.

²Id.

threatened, carry the person who threatens to beat him before a justice in order to find sureties. And granting that no bare words, in the judgment of the law, carry in them so much terror as to amount to an affray, yet it seems certain that in some cases there may be an affray where there is no actual violence; as where persons arm themselves with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people.¹

An affray may be aggravated by the circumstances under which it takes place, either, first, in respect of its dangerous tendency; secondly, in respect to the persons against whom it is committed; or, thirdly, in respect to the place in which it happens.²

Justices of the peace may proceed to suppress affrays upon view. The extent of punishment of this offence is very much within the discretion of the magistrate; and when there are aggravating circumstances, the offending party should be bound over to the higher court.

1. *Complaint for a common affray.*

A. B. of, &c. on oath complains that C. D. of, &c. and E. F. of &c. heretofore, to wit: on, &c. with force and arms, at —, in said county, being unlawfully assembled together and arrayed in a warlike manner, then and there, in a certain public street and highway, there situate, unlawfully, and to the great terror and disturbance of divers good citizens of this State, then and there being, did make an affray, to the evil example of all others in the like case offending, and against the peace and dignity of said State.

2. *Complaint for disturbance of the Peace.*

That C. D. of — in the county of C—, on the — day of — in the year one thousand eight hundred and fifty — at —, aforesaid, with force and arms, was a disturber and breaker of the peace, and then and there contriving and intending to disturb the peace of said State, did, in one of the public streets of said town, utter loud exclamations and outcries, and did then and thereby draw together a number of persons, to the great disturbance of divers citizens, and against the peace, &c.

¹ 1 Russ. 271.

² Ib. 270.

III. DRUNKENNESS.

There are two offences which properly come under this head ; first, some specific act of drunkenness ; and second, the being a common drunkard, which is the result of a series of acts. The punishment awarded to each of these is different from that of the other, as well as the character of the proof requisite to a conviction. This distinction should be borne in mind whenever receiving or hearing a complaint for either of these offences.

1. *Complaint against a common Drunkard.*

A. B. of C—, in said county, yeoman, on oath, complains that C. D. of C—, in said county, on divers days and times at said —, and at other places in said county, within six months now last past, was intoxicated with spirituous liquor and drunk, and so the said complainant says that the said C. D. at said —, on the — day of —, in the year eighteen hundred and fifty —, is a common drunkard, against the peace, &c. and contrary to the form of the statute in such cases, &c.

2. *Complaint for Drunkenness.*

C—, ss.

A. B. of —, on the — day of —, in the year of our Lord one thousand eight hundred and fifty —, on oath complains, that E. F. of —, in said county, yeoman, on the — day of —, at said —, was guilty of drunkenness, and was drunk by the voluntary use of intoxicating liquor, against the peace of the State, and contrary to the form of the statute in such case made and provided.

IV. EMBEZZLEMENT.

If any officer, agent, clerk, or servant of any incorporated company, or if any clerk, agent, or servant of any person, or copartnership, except apprentices and other persons under the age of sixteen years, shall embezzle, and fraudulently convert to his own use, or shall take and secrete, with intent to convert to his own use, without consent of his employer or master, any money or property of another, which shall have come to his possession, or shall be under his care by virtue of such employment, he shall be deemed, by so doing, to have committed larceny.¹

¹R. S. ch. 156, sec. 6.

If any carrier or other person, to whom any money, goods, or other property, which may be the subject of larceny, shall have been delivered, to be carried for hire; or if any other person, who shall be entrusted with such property, shall embezzle, or fraudulently convert to his own use, any such money, goods, or other property, either in the mass, as the same were delivered, or otherwise, and before the same shall be delivered at the place, or to the person where and to whom they were to be delivered, he shall be deemed, by so doing, to have committed larceny.¹

These statutes seem to provide against embezzlements by the following persons: 1st. Cashiers, or other officers, agents or servants of any incorporated bank. 2d. Officers, agents, clerks or servants of any incorporated company. 3d. Clerks, agents, or servants of any private person or copartnership. 4th. Carriers for hire, and other persons intrusted with property, the subject of larceny.

It is often difficult to distinguish, between a larceny and an embezzlement. A taking is requisite to larceny. A common carrier, for instance, may commit a larceny of the thing he has agreed to carry, provided he does a distinct act of taking, thereby terminating, or after terminating, the bailment, as it is usually expressed.

So too, on the other hand, it is often exceedingly difficult to determine whether a given statement of facts amounts to an embezzlement, or be only a breach of trust; and to mark out with entire precision the line of discrimination between acts punishable as crimes, under the statutes, and those that may not be embraced by them, while they may yet present strong cases of breach of good faith and violation of the confidence reposed in the party guilty of the breach of trust. For it is by means of these statutes that acts, formerly denominated mere breaches of trust, subjecting the party to a civil action only, have now come to be cognizable by the criminal courts.

All statutes are to receive a reasonable construction; and the language used in them, where it is not professedly technical, is to be taken in its ordinary acceptation in the community; so that all may understand its meaning and intent. But it has ever been held, in this State, as a fundamental principle of construction, that penal statutes, affecting the life, liberty, good name and property of the citi-

¹R. S. ch. 156, sec. 7.

zen, shall be construed strictly, according to the clear design of the makers, to be especially ascertained from the terms made use of; and that where such terms are clear and unambiguous, they are not to be departed from nor enlarged by any intendment derived from any other source; but that where the language used is ambiguous or general, and is fairly susceptible of more than one construction, then recourse is to be had to the design of the makers, to the abuses to be remedied, and to preceding statutes, if any, in respect to the same offences; still, that they are not to be so construed as to multiply offences, nor to enlarge, by mere implication, the classes of offenders.¹

By "the money or property of another," in the sixth section above cited, the embezzlement of which by any clerk, agent, or servant, without the consent of his employer, is made larceny, is meant the money or property of any person except such agent, clerk, or servant, who embezzles it.²

An auctioneer who receives money on the sale of his employer's goods, and does not pay it over, but misapplies it, is not an agent or servant within the intent of the statute; whether he receives the goods for sale in the usual mode, or receives them on an agreement to pay a certain sum therefor within a specified time after the sale. The money received by an auctioneer for goods sold by him, in both these cases, is his own, and not "the money of another."³

The statute is not confined to the clerks and servants of all persons in trade, but extends to the clerks and servants of all persons whatever. A female servant is within the statute. So a person is sufficiently a servant, though he be only occasionally employed when he has nothing else to do.

1. *For Embezzlement of Goods delivered to a Servant to keep for his master.*

That C. D. of, &c. heretofore to wit, on, &c. then being a servant of and to one A. B. and not an apprentice, or a person under the age of sixteen years, he, the said A. B. did then and there, upon confidence and trust, deliver unto the said C. D., his said servant, one gold watch, of the value of one hundred dollars, of the goods and chattels of him the said A. B., safely to keep the same to the use of him the said A. B.; and that he the said C. D. after the said delivery, and whilst he

¹8 Met. 254, 255.

²2 Met. 343.

³Ib.

was such servant as aforesaid, to wit, on the said, &c. with force and arms at, &c. aforesaid, feloniously did embezzle the same gold watch and convert the same to his own use, with the intent to steal the same, and defraud the said A. B., his said master, thereof, contrary to the trust and confidence in him the said C. D. put by the said A. B., his said master, against the peace and dignity of said State, and contrary to the form of the statute in such case made and provided.

2. *For a single Felony, against a Clerk of a Trader for Embezzlement.*

That C. D. of, &c. heretofore, to wit, on &c. aforesaid, was clerk to A. B. and E. F. of —, traders, and employed and entrusted by the said A. B. and E. F. to receive money for them; and being such clerk, so employed and entrusted as aforesaid, then and there, by virtue of such employment and entrustment as aforesaid, he, the said C. D. did receive and take into his possession a certain sum of money, to wit, the sum of fifty dollars of the monies of said A. B. and E. F. for and on account of the said A. B. and E. F. his said masters and employers, and having so received and taken into his possession the said sum of money, for and on the account of his said masters and employers, he the said C. D. then and there, with force and arms, fraudulently and feloniously did embezzle and secrete part of the said sum of money, to wit, the sum of twenty dollars and seventy-five cents, and fraudulently convert the same to his own use, against the peace and dignity of said State, and contrary to the form of the statute in such case made and provided. Wherefore, &c.

3. *Embezzling Bank Notes by a Servant.*

That C. D. of, &c. heretofore, to wit, on, &c. at, &c. aforesaid, was clerk and servant to M. G., widow, and employed and entrusted by her, the said M. G., to receive money, goods, bills, notes, and other valuable securities, for and on the account of her, the said M. G.; and being such clerk and servant, so employed and entrusted as aforesaid, he the said C. D. then and there did receive and take into his possession, of and from one R. D. one bank note for the payment and of the value of fifty dollars, one other bank note for the payment and of the value of twenty dollars, one other bank note for the payment and of the value of ten dollars, and four other bank notes for the payment of five dollars each and of the value of twenty dollars, for and on the account of the said M. G., his mistress and employer, and having so received and taken into his possession the said bank notes, for and on the account of the said mistress and employer, he the said C. D. then and there, with force and arms, fraudulently and feloniously did embezzle and secrete the same, and fraudulently convert the same to his

own use, against the peace and dignity of the said State, and contrary to the form of the statute in such case made and provided. Wherefore, &c.

4. *Against the President and Cashier of a Bank for an Embezzlement, setting forth the Embezzlement generally.*

That heretofore, to wit, on, &c. at, &c. the said W, then and there, being one of the directors and president of the P. bank, a corporation then and there duly and legally established, organized, and existing under and by virtue of the laws of this State, as an incorporated bank, and he, the said B. being then and there cashier of said bank, did, by virtue of their said respective offices and employments, and whilst they, the said W. and B., were severally employed in their said respective offices, have, receive, and take into their possession, certain money to a large amount to wit; to the amount and sum of \$220,000, and of the value of \$220,000; divers bills called bank bills, amounting in the whole to the sum of \$20,000, of the value of \$20,000; divers notes, called treasury notes, amounting in the whole to the sum of \$75,000, and of the value of \$75,000, of the goods and chattels, property and money, of them, the said president, directors and company of the P. B. in their banking house there situate, being; and the said money, bills and notes, then and there, unlawfully, fraudulently and feloniously did embezzle in the banking house aforesaid, and convert to their own use, against the peace, &c. and contrary to the form, &c.

5. *Against a common Carrier for embezzling a package containing a Bank Note.*

That C. D. of, &c. heretofore, to wit, on, &c. was a common carrier, employed in carrying letters and packets from the town of C—, in said county, to a certain, &c. in the county of, &c. for hire, and that on, &c. aforesaid, at —, aforesaid, a certain package of great value, to wit, &c. the property of one A. B. and by him, the said A. B. sent and directed to E. F. of, &c. in, &c. then containing therein a certain bank note, signed and subscribed by the president and cashier of the bank of — promising to pay — or bearer on demand the sum of fifty dollars, the tenor of which, &c. [state note verbatim, if possible, though not necessary] came to the hands and possession of the said C. D., then and there being a common carrier so employed as aforesaid, to be by him, the said C. D., as such common carrier, delivered, &c. and that he being, &c. and having the said package containing the said bank note in his hands and possession, with force and arms, feloniously did embezzle and secrete the said package, then and there containing the said bank note, and the same fraudulently convert to his own use; against the peace of the said State, and contrary to the form of the statute in such case made and provided.

6. *Against a Factor pledging goods, etc. intrusted to him for sale.*

That heretofore, to wit, on, &c. at, &c. in, &c. A. B. did intrust to C. D., the said C. D. then and there being a factor and agent ["factor or agent"] ten bales of cotton of great value, to wit, of the value of two hundred and fifty dollars, for the purpose of selling the same, ("intrusted for the purpose of sale with any goods or merchandize, or intrusted with any bill of lading, warehouse keeper's or wharfinger's certificate, or warrant, or order for the delivery of goods or merchandize") and that the said C. D. of, &c. in, &c. factor and agent as aforesaid, on, &c. aforesaid, at, &c. in, &c. for his own benefit, and in violation of good faith, the said ten bales of cotton unlawfully did deposite and pledge ("deposite or pledge any such goods or merchandize, or any of the said documents,") with one J. P. as a security for a certain sum of money, to wit, the sum of two hundred and fifty dollars, by the said C. D. at the time of his so making such deposite and pledge as aforesaid, borrowed and received from the said J. P. ["as a security for any money or negotiable instrument borrowed or received by such factor or agent, at or before the time of making such deposit or pledge, or intended to be thereafter borrowed or received,") and feloniously embezzled the said property, and converted the same to his own use, against the peace and dignity of the said State, and contrary to the form of the statute in such case made and provided.

7. *Against a Factor for secreting goods intrusted to him for sale, with intent to embezzle the same.*

That the said A. B. heretofore, to wit, on, &c. at, &c. did intrust to one C. D. of, &c. then and there being a factor and agent, ten bales of cotton of great value, to wit, of the value of two hundred and fifty dollars; and the said C. D. then and there, being a factor and agent as aforesaid, the said ten bales of cotton, then and there, the property of the said A. B., did secrete, with intent to embezzle the same, and fraudulently convert the same to his own use, against the peace and dignity of the State, and contrary to the form of the statute in such case made and provided.

V. FALSELY PERSONATING ANOTHER.

Every person who shall falsely personate another, and in such assumed character shall receive any money or other thing intended to be delivered to the party so personated, with intent to convert the same to his own use, shall be deemed, by so doing, to have committed larceny.¹

¹R. S. ch. 156, sec. 8.

To constitute this offence, four things must concur, and four distinct averments must be proved.

1. There must be an intent to defraud;
2. There must be an actual fraud committed;
3. False pretences must be used for the purpose of perpetrating the fraud; i. e. the false name must be taken for the purpose of effecting the fraudulent end; and,
4. The fraud must be accomplished by means of the false pretences made use of for that purpose, viz: they must be the cause which induced the owner to part with his property.

When two persons are jointly complained against under this statute, evidence that one of them, with the knowledge, approbation, concurrence and direction of the other, so made the false pretences charged, warrants the conviction of both. And it is not necessary, in order to convict the defendants, in such case, to prove that they, or either of them, obtained the goods on their own account, or expected to derive, personally, any pecuniary benefit therefrom. An allegation that the defendant obtained goods of A. B. and C. D., partners in trade, by false pretences made to them, is supported by proof that the defendant made the alleged false pretences to their clerk and salesman, who communicated them to B., and that the goods were delivered to the defendant in consequence of those false pretences.¹

1. *For obtaining goods of a shop-keeper under pretence of being a servant to a customer.*

A. B. of, in, &c. shop-keeper, upon his oath complains, that C. D. of, &c. in, &c. laborer, being an evil disposed person and a common cheat, and contriving and intending unlawfully, fraudulently and deceitfully to cheat and defraud the said A. B. of his goods, wares and merchandize, for the support of his profligate way of life, heretofore, to wit, on, &c. at, &c. unlawfully, knowingly, and designedly, did falsely pretend to the said A. B., that he, the said C. D., then was the servant of E. F. (the said E. F. then and long before being well known to him, the said A. B. and a customer of him the said A. B. in his said business and way of trade,) and that he, the said C. D. was then sent by the said E. F. to the said A. B. for five yards of superfine woolen cloth, by which said false pretences, the said C. D. did then and there unlawfully, knowingly, and designedly obtain from the said A. B. five yards of superfine woolen cloth, of the value of fifty

¹19 Pick. 182—183.

dollars, of the goods, wares and merchandize of him, the said A. B. with intent him, the said A. B., then and there to cheat and defraud of the same; whereas in truth and in fact, the said C. D. was not then then the servant of the said E. F. and was not then, or ever hath been, sent by the said E. F. to the said A. B. for the said cloth, or for any cloth whatever, to the great damage and deception of the said A. B., against the peace and dignity of the said State, and contrary to the form of the statute in such case made and provided.

VI. GAMING AND GAMING HOUSES.

This a statute offence. There may be two classes of offenders; 1st. Inholders or common victualers; 2d. The persons themselves, actually gaming. The former may offend, first by having, or keeping in or about their houses or other buildings, implements of gaming;¹ second, by suffering persons resorting thither to use or exercise the forbidden games.² The latter may offend, first, by using or exercising any of the forbidden games in or about the house or other buildings of such innholder or victualer;³ and, secondly, by playing at billiards, cards, dice, or any other unlawful game, at a table kept at an unlicensed house, &c.⁴

There are, besides, certain other offences of this description which do not come within the final jurisdiction of a magistrate.

The second offence in the first division, viz: the suffering persons resorting to the house or buildings to use or exercise any of the forbidden games, is not a continuing offence. It consists in permitting persons for hire and reward to resort to a building used by the defendant, for the purpose, on their part, of playing at some one or more of the forbidden games. The offence may be repeated from day to day, and in connection with different individuals, and of course may be the subject of distinct complaints. Such being the nature of the offence, it should properly be charged on a day certain, and not on divers days and times.⁵

1. *Against a licensed Innholder for having a bowling alley in the yard of his public house.*

Complains A. B, of, &c. that heretofore, to wit, on, &c. and on divers days and times between that time and the date of this complaint,

¹R. S. ch. 36, sec. 8.

²Ib.

³Ib. sec. 9.

⁴R. S. ch. 35, sec. 8.

⁵9 Met. 575.

at C—, in said county, C. D., of, &c. being then and there a licensed innholder, licensed to keep the public house called the — hotel at C—, aforesaid, unlawfully had and kept at, &c. in, &c. and upon the yard attached and belonging to his said public house, a certain building there situate, and then and there actually used and occupied for the purpose of playing at bowls, the same being then and there an unlawful game, and all the implements in said game, against the peace of the State, and contrary to the form of the statute, &c.

2. *Against a licensed Innholder for suffering persons resorting to his house to play at Bowls.*

That heretofore, to wit, on, &c. at, &c. the said C. D., being then and there a licensed innholder, &c. suffered certain persons whose names are not known to the complainant, resorting to his said house, to play at bowls, the same being an unlawful game, against the peace, &c. and contrary to the form, &c.

3. *Against a person playing at Billiards at a Table kept in an unlicensed House.*

That C. D. of, &c. being a person of idle and dissolute habits, heretofore, to wit, &c. and on divers days and times, both before and after, at, &c. did unlawfully play at a certain unlawful game called billiards, at a table kept, and made use of for that purpose, by one E. F., in a certain house or building there situate, by him the said E. F. actually occupied and improved; which said table was then and there kept and maintained by him, the said E. F., in the house and building aforesaid, for the purpose of playing at the said unlawful game, called billiards, and for hire, gain or reward; against the peace of said State, and contrary to the form of the statute in such case made and provided.

4. *Against a person for keeping a Billiard Table at an unlicensed House.*

That heretofore, to wit, on, &c. and at divers days and times, both before and after, at, &c. one C. D., at a certain house there situate, by him the said C. D., actually occupied and improved, did keep and maintain a billiard table, for the purpose of playing at a certain unlawful game called billiards, and for hire, gain and reward; against the peace of said State, and contrary to the form of the statute in such case made and provided.

5. *Against such persons for permitting persons to resort to such table to play.*

That heretofore, to wit, on, &c. at, &c. one C. D. of, &c. for hire, gain and reward, unlawfully did suffer certain persons, whose names

are unknown to this complainant, to resort to a certain building there situate, and by the said C. D. then and there actually used and occupied, for the purpose of playing at billiards; the same being then and there an unlawful game, against the peace, &c. and contrary to the form, &c.

If the complaint be for hawking or peddling, or horse-racing, or exhibiting shows or plays, the form of the allegation may be varied to meet the case.

VII. HOUSE OF CORRECTION.

It has already been seen that certain minor offenders must, on conviction, be sentenced to suffer punishment in the house of correction, as provided in the Revised Statutes. Forms for complaints in case of such offences are given in this connection.

1. *Against a Vagabond.*

A. B., of, &c. heretofore, to wit, on, &c. at C—, aforesaid, is a vagabond and idle person, and on divers days and times, at said C—, within six months last past, has wandered about from place to place, neglecting all lawful calling and employment, and not having any home, nor means of support.

2. *Against a person for juggling, and unlawful games.*

A. B. of, &c. upon his oath complains, that C. D. of, &c. laborer, heretofore, to wit, on, &c. at, &c. was and is a person using a certain subtle craft, juggling, unlawful games, and plays, to wit, certain games and plays called—, and that he, the said C. D., heretofore, to wit, on, &c. in, &c. at, &c. and on divers other days and times, between that day and the day of exhibiting this complaint, did subtly and craftily juggle, gamble, and play at the said unlawful game and play, called — with divers persons to the said complainant unknown, for the purpose and with intent to obtain the moneys and property of the said persons unknown, by craft, juggling and unlawful games and plays; against the peace of said State, and contrary to the form of the statute in such case made and provided.

3. *Against a common Piper and fiddler.*

A. B. of, &c. upon his oath complains, that C. D. of, &c. in, &c. laborer, was and is a common piper and fiddler, and that he, the said C. D., at, &c. heretofore, to wit, on divers days and times between the — day of — and the day of exhibiting this complaint, with a certain musical instrument called a —, did make divers noises and

disturbances, to the great injury, disturbance, and disquiet of divers good and peaceable citizens of said &c., against the peace of said State, and contrary to the form of the statutes in such cases made and provided.

4. *Against a common night-walker.*

That C. D. of, &c. heretofore, to wit, on, &c. at, &c. was and is a common night walker, and from the — day of — to the day of the filing of this complaint, during divers nights within the time aforesaid, did walk and ramble in the streets and common highways in the said town of — at unseasonable hours of said nights, without having any lawful business, and without any necessity therefor; against good morals and good manners; against the peace of said State, and contrary to the form of the statutes in such cases made and provided.

6. *Against a wanton and lascivious person.*

That C. D. of, &c. heretofore, to wit, on, &c. and on divers other days and times between that day and the day of filing this complaint, was and is a wanton and lascivious person, and on the said days and times, at, &c. did utter certain lewd, indecent, wanton, and lascivious expressions, in the hearing and presence of divers good and worthy citizens of said State, and did then and there wantonly and lasciviously expose to view the private parts of the body of him, the said C. D., and did then and there, and on the days and times aforesaid, otherwise wantonly and lasciviously misbehave and conduct himself; against good morals and good manners; against, &c. contrary, &c.

And the forms in cases of "common brawlers," "persons neglecting their families," and the other offences mentioned in the statute, will be very much like the foregoing, *mutatis mutandis*.

VIII. LARCENY AND RECEIVING STOLEN PROPERTY.

Larceny is divided into two branches, *Simple* and *Compound*. The first is called simple, because it is unaccompanied with any atrocious circumstances; the other is called compound, because it includes within it aggravating circumstances.

1. *What may be made the subject of larceny.* In order to be the subject of larceny, a thing must have a value; but it is enough that a thing is of any pecuniary value to the owner, though it be not of any value to sell.

So, in order to be the subject of larceny, a thing must be moveable, or such that it can be removed. The common law limits larceny to

personal property. The statute points out what may be the subject of larceny: "Of the property of another, any money, goods or chattels, any writ, process or public record, any bond, bank note, promissory note, bill of exchange, or other bill, order or certificate, or any book of accounts respecting money, goods or other things, or any deed or writing, containing a conveyance of land, or any valuable contract in force, or any receipt, release or defeasance, or any instrument or writing, whereby any demand, right or obligation shall be created, increased, extinguished or diminished."¹

A memorandum book, kept by a person who works for a tailor by the piece, and in which entries are made of the names of the persons owning the garments worked upon, and the prices of the work, is a "book of accounts respecting money, goods, or other things," and is the subject of larceny; and such book, given by a tailor to the person who works for him, for the purpose of such entries being made therein, is the property of such person, and not of the tailor.²

A certificate given to A. by B., whom C. had promised to pay for work, stating that A. has paid for the work, and that B. has no claim therefor on C., is a "receipt or release," and is the subject of larceny.³

The rule of the common law, that things savoring of the realty could not be made the subject of larceny, was so strict that a larceny could not be committed even of title deeds. This rule is now much relaxed. The law still stands, however, that no larceny can be committed of things that adhere to the freehold, as corn, grass, trees, and the like; but the severance of them is a mere trespass; punishable, if malicious, criminally; otherwise, the subject of a civil suit only.⁴

But if the thief severs them at one time, and comes again at another time, after they are so severed and turned into personalty, and takes them away, it is larceny; and so it is, if the owner or any one else has severed them.

2. *What must be alleged and proved.* It is said that the following things are necessary to constitute the offence of larceny. 1. A taking; 2. A carrying away; 3. With a felonious intent; 4. Of the personal goods of another; 5. Without the consent, or against the will of the owner.⁵

¹R. S. ch. 156, sec. 1.

²9Met. 273.

³Ib.

⁴Arch. Cr. Pl. 171—12 Pick. 104.

⁵3 Chitty's Cr. Law—Larceny.

1. *Complaint for a simple Larceny.*

A. B. of, &c. upon his oath, complains that C. D. of, &c. heretofore, to wit, on, &c. at, &c. with force and arms, one broadcloth overcoat of great value, to wit, five dollars, of the goods and chattels of one E. F. then and there being found, feloniously did steal, take and carry away, against the peace of the State, and contrary to the statute in such cases made and provided.

2. *For breaking and entering a meeting house in the night, and committing a larceny therein.*

That A. B. of, &c. heretofore, to wit, on, &c. with force and arms, at —, aforesaid, the meeting house of the first parish in said —, there situate, being a building erected for the public use, feloniously did break and enter in the night time, and therein, one silver cup of the value of ten dollars, of the goods and chattels of the parish aforesaid, then and there being found, then and there feloniously did steal, take and carry away, against the peace, &c. and contrary to the form, &c.

3. *Larceny in the day time in a dwelling house.*

A. B. of, &c. yeoman, upon his oath, complains that heretofore, to wit, on, &c. C. D. of — aforesaid, with force and arms, at —, aforesaid, one cloth coat of the value of five dollars, one cloth waistcoat of the value of two dollars, of the goods and chattels of him the said A. B., in the dwelling house of him the said A. B. then and there being found, then and there feloniously did steal, take and carry away, against the peace, &c. and contrary to the form of the statute in such case made and provided.

4. *For breaking and entering a court house in the night time, and committing a larceny therein.*

A. B. of, &c. upon his oath, complains that C. D. of, &c. laborer, heretofore to wit, on &c. with force and arms, at, &c. the court house of the said county of C—, there situate, and erected for public uses, to wit, for holding the judicial courts in the said county of C—, in the night time, did break and enter, and [here insert the articles stolen, and allege the value of each,] of the goods and chattels of the said county of C—, then and there in the court house aforesaid being found, feloniously did steal, take, and carry away; against the peace of said State, and contrary to the form of the statute in such case made and provided.

5. *For stealing at a fire.*

A. B. of, &c. upon his oath, complains that C. D. of, &c. heretofore, to wit, on, &c. at, &c. with force and arms, a silver pitcher of great value, to wit, of the value of one hundred dollars, of the goods and chattels of him the said A. B. then and there being found in the dwelling house of him the said A. B., which said dwelling house was then and there on fire, feloniously did steal, take and carry away, against the peace, &c. and contrary to the form, &c.

6. *For stealing property removed in consequence of alarm caused by fire.*

A. B. of, &c. upon his oath, complains that C. D. of, &c. heretofore, to wit, on, &c. at, &c. with force and arms a large mirror of great value, to wit, of the value of fifty dollars, of the goods and chattels of him the said A. B. the same being then and there removed from the dwelling house of the said A. B. in consequence of an alarm caused by fire, feloniously did steal, take and carry away, against the peace, &c. and contrary to the form of the statute in such case made and provided.

7. *For breaking and entering a stable in the night-time, and committing a larceny therein.*

A. B. of, &c. innholder, upon his oath, complains that C. D. of, &c. laborer, heretofore, to wit, on &c. with force and arms, at — aforesaid, the stable of him, the said A. B., there situate, in the night-time did break and enter, and one gelding of the value of one hundred dollars, one saddle of the value of ten dollars, and one bridle of the value of five dollars, of the goods and chattels of the said A. B. then and there in the stable aforesaid being found, feloniously did steal, take, and carry away, against the peace of said State, and contrary to the form of the statute in such case made and provided.

8. *For stealing from the person.*

A. B. of, &c. yeoman, upon his oath, complains that C. D. of, &c. laborer, heretofore, to wit, on, &c. with force and arms, at, &c. one silver watch, with a steel chain, of great value, to wit, of the value of twenty dollars, of the goods and chattels of him, the said A. B., then and there from the person of him, the said A. B., feloniously did steal take, and carry away; against the peace of said State, and contrary to the form of the statute in such case made and provided.

9. *Against an accessory for receiving stolen goods.*

A. B. of, &c. yeoman, upon his oath, complains that C. C. of, &c. laborer, heretofore, to wit, on, &c. with force and arms, at, &c. one

silver spoon, of the value of five dollars, one gold watch, of the value of fifty dollars, of the goods and chattels of one E. F. then and there in the possession of the said E. F. being found, feloniously did steal, take and carry away, against the peace of said State, and contrary to the form of the statute in such case made and provided. And the said A. B. upon his oath aforesaid, further complains, that G. H. of said — laborer, afterwards, to wit, on, &c. with force and arms, at, &c. the goods and chattels aforesaid, so as aforesaid feloniously stolen, taken, and carried away, feloniously did receive and have, and did then and there aid in concealing the same; he, the said G. H. then and there well knowing the said goods and chattels to have been feloniously stolen, taken, and carried away, against the peace, &c. and contrary, &c.

10. *Against an accessory, for harboring, concealing and maintaining the principal felon.*

[State the offence against the principal felon, as in the preceding precedent, and then proceed as follows.] And the said A. B. upon his oath aforesaid, further complains, that G. B. of said —, laborer, afterwards, to wit, on, &c. with force and arms, at, &c. the aforesaid C. D. did then and there, knowingly, harbor, conceal and maintain, in the larceny and felony aforesaid, against the peace of, &c. and contrary to, &c.

11. *Against an accessory for a misdemeanor, in receiving stolen Goods, the principal felon being unknown.*

A. B. of, C—, in, &c. yeoman, upon his oath, complains that C. D. of, &c. laborer, being a person of evil name and fame, and a common buyer and receiver of stolen goods, heretofore, to wit, on, &c. with force and arms, at, &c. one silver tankard, of the value of fifty dollars, of the goods and chattels of him the said A. B. by a certain evil-disposed person, to the said A. B. yet unknown, then lately before feloniously stolen of the said A. B., unlawfully, unjustly, and for the sake of wicked gain, did receive and have, he, the said C. D. then and there, well knowing the said goods and chattels to have been feloniously stolen; against the peace of said State, and contrary to the form of the statute in such case made and provided. Wherefore, &c.

X. LORD'S DAY.

Statutes for enforcing the observance of the Sabbath are among the earliest legislation of the colony. Their object is, to secure reverence and respect for one day in the week, in order that religious exercises may be performed without interruption from common and secular

employments upon this day.¹ Common victuallers are forbidden to keep open, innholders to entertain company except travellers, and the public generally to attend to their usual secular occupations, or to travel, except for purposes of necessity or charity. A carrier of the public mail is not, however, within the statute.² Decorum is also enjoined upon all attending public worship, and breaches of the several provisions are attended with penalties, slight indeed, but supposed to be sufficient to check the attacks of idleness and levity upon this day, set apart for the religious exercises of the whole community. No person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath, and actually refrains from secular business and labor on that day, is liable to any of the statute penalties for performing secular business and labor on the Lord's day, provided he disturbs no other person.³

1. *Complaint against a common victualler for keeping open on the Lord's day.*

A. B. of, &c. on his oath complains that C. D. of, &c. a common victualler, heretofore, to wit, on, &c. the same being Lord's day, at C—, in said county, kept an open cellar or shop, and then and there entertained divers persons to your complainant unknown, and then and there sold ——— to divers unknown persons, against the peace, &c. and contrary to the form of the statute in such case made and provided.

2. *For working on the Lord's day.*

That C. D. of, &c. heretofore, to wit, on, &c. being Lord's day, at, &c. did then and there do and perform certain labor, business and work, to wit, [here state what the work was,] the said labor, business, and work not being works of necessity or charity; against the peace of said State, and contrary to the form of the statute in such case made and provided.

3. *For being present at a public diversion on the Lord's day.*

That C. D. of, &c. heretofore, to wit, on, &c. the same being Lord's day, at, &c. was voluntarily present at a certain public diversion called [here state what the diversion was,] to the great scandal of religion, against good morals and good manners, against the peace of the State, and contrary to the form, &c.

¹14 Mass. 348.

²R. S. ch. 160, sec. 30.

³6 Mass. 76.

4. *Against a person for travelling on the Sabbath.*

That C. D. of, &c. heretofore, to wit, on, &c. being Lord's day, unlawfully travelled with a stage carriage for passengers through the town of N—, the said travelling not being from necessity or charity; against the peace, &c. and contrary to the form of the statute in such case made and provided.

5. *Against an innholder for entertaining persons not travellers strangers or lodgers, on the Lord's day.*

That C. D. of, &c. being an innholder in the town of —, in said county, and duly licensed to keep a house of public entertainment in said town of —, heretofore, to wit, on, &c. being Lord's day, at — aforesaid, did entertain one E. F., not being a traveller, stranger, or lodger in said house, and did then and there suffer him, the said E. F., to abide and remain in his said public house of entertainment, spending his time idly, and doing secular business on the said Lord's day, in his, the said C. D.'s public house of entertainment, to the evil and pernicious example of others in like case to offend; against good manners and good morals, against the peace, &c. and contrary to the form, &c.

6. *Against a person for being present at a public diversion on the evening following the Lord's day.*

That C. D. of, &c. at —, aforesaid, heretofore to wit, on, &c. in the evening of the same day, the same being the evening following the Lord's day, was voluntarily present at a certain public diversion called [here set forth the diversion] to the great scandal of religion, against good morals and good manners, against the peace of the State, and contrary to the form, &c.

7. *Against an Innholder for entertaining persons not travellers, &c. on the evening preceding the Lord's day.*

That C. D. of, &c. being an innholder in the town of — aforesaid, and duly licensed to keep a house of public entertainment therein, at —, aforesaid, heretofore, to wit, on, &c. in the evening of the same day, being the evening preceding the Lord's day, did entertain in his said house one E. F., not being a traveller, stranger, or lodger in said house, and did then and there suffer the said E. F. to be in his said house, on the said evening, spending his time there, although not a traveller, stranger or lodger in said house; to the evil and pernicious example of others in like cases, against good manners and good morals, against the peace of said State, and contrary to the form of the statute in such case made and provided.

8. *For behaving rudely and indecently, within the walls of a house of public worship.*

That C. D. of, &c. heretofore, to wit, on, &c. being Lord's day, at —, in said county, within the walls of a certain house of public worship there, called the First Parish Church, did behave rudely and indecently by [here set forth the rude and indecent behaviour,] against the peace, &c. and contrary to the form, &c.

9. *For wilfully interrupting or disturbing an assembly met for worship.*

That C. D. of, &c. heretofore to wit, on, &c. being Lord's day, at P—, aforesaid, with force and arms did wilfully interrupt and disturb a certain assemblage of people there met for the worship of God, within the place of their meeting, to wit, within the meeting house known as the Park Street Church, at P—, aforesaid, by making divers loud and indecent noises and tumults during the performance of divine service in said meeting house; to the great injury of the people there assembled, against good morals and good manners, against the peace and dignity of said State, and contrary to the form of the statute in such cases made and provided.

XI. MALICIOUS INJURIES AND WILFUL TRESPASSES.

These injuries and trespasses are most of them not indictable at the common law, but are offences created by statute, and punishable in the mode pointed out by statute. The several provisions in regard to them may be found in the one hundred and sixty-second chapter of the Revised Statutes.

1. *For maliciously destroying an ornamental tree.*

That C. D. of, &c. heretofore to wit, on, &c. with force and arms, at P—, aforesaid, unlawfully, wilfully, maliciously, wantonly, and without cause, did cut down and destroy, one certain elm tree in a certain street in the said town of P—, called Free-street, there standing and growing for shade and ornament, and not being his own, against the peace, &c. and contrary to the form of the statute in such case made and provided.

2. *For maliciously destroying a fruit tree.*

That C. D. of, &c. heretofore, to wit, on, &c. with force and arms, at —, aforesaid, unlawfully, wilfully, maliciously, wantonly and without cause, did injure, by girdling and lopping, one certain fruit

tree, to wit, a peach tree not his own, then and there standing and growing for the bearing of fruit in the orchard of one A. B., there situate and being, against the peace, &c. and contrary to the form, &c.

3. *For throwing down bars maliciously, and leaving the same open.*

That C. D. of, &c. being an evil disposed person, heretofore, to wit, on, &c. with force and arms, at —, aforesaid, did unlawfully and maliciously throw down certain bars, being part of a fence belonging to and enclosing a certain piece or parcel of land there situate; and did then and there unlawfully leave open the same bars; the said land, which was then and there, enclosed by the fence and bars aforesaid, then and there belonging to him the said A. B. and not to him the said C. D., and was not his, the said C. D.'s, own; and in which he the said C. D. then and there had no interest, against the peace of said State, and contrary to the form of the statute in such case made and provided.

4. *For wilfully destroying a monument of a tract of land.*

That C. D. of, &c. heretofore, to wit, on, &c. with force and arms, at, &c. did wilfully and maliciously break down, injure, remove, and destroy a certain monument on the county road leading from, &c. to, &c. being a stone post, with a hole drilled in it, there erected and set in the ground at a corner on said road between a certain tract of land of said A. B. and land of one E. F., for the purpose of designating the boundaries of the said land of the said A. B., against the peace, &c. and contrary to the form, &c.

5. *For wilfully removing a guide-board.*

That C. D. of, &c. being an evil-disposed person, heretofore, to wit, on, &c. at, &c. with force and arms, a certain guide-board, placed and put up in a public road there, for public convenience and the information of travellers, did unlawfully, wilfully, and maliciously remove; he, the said C. D. not being properly or legally authorized so to do; against the peace of said State, and contrary to the form of the statute in such case made and provided.

6. *For wilfully cutting down timber on the land of another.*

That C. D. of —, heretofore, to wit, on, &c. with force and arms, at —, aforesaid, the land, to wit, the woodland of one A. B. there situate, did wilfully enter upon and into, and then and there unlawfully, wilfully, and maliciously, cut down and destroy one certain timber tree of him the said A. B., standing and growing on the land of him the said A. B., he the said C. D. then and there not having any interest or property in the same tree, without the license of the owner thereof, and against the peace, &c. and contrary to the form, &c.

7. *For cutting down corn standing, from the land of another, and carrying it away.*

That C. D. of, &c. at, &c. heretofore, to wit, on, &c. did cut down a great quantity, to wit, five bushels of corn then and there growing on a certain tract of land, then and there owned and occupied by the said A. B., and did carry said corn away; against the peace, &c. and contrary, &c.

8. *For trespass in entering on a garden to take fruit.*

That C. D. of, &c. heretofore, to wit, on, &c. with force and arms, at —, aforesaid, the garden of one A. B. there situate, did unlawfully, wilfully and maliciously, enter upon, without permission of him, the said A. B., the owner thereof, secretly in the night-time, to wit, between sun-setting and sun-rising, with intent to take and carry away the fruit there growing and being, against the peace, &c. and contrary to the form, &c.

XII. PENAL ACTIONS.

Under this somewhat general title, we would range all those classes of offences, not in themselves morally wrong, but made penal by various statutes.

1. *Complaint for being disorderly at a town meeting.*

That the inhabitants of said —, being duly assembled in town meeting, on the 15th day of March, A. D. 1850, for the choice of town officers for the year, then next ensuing, and a moderator being duly chosen, who called on the electors present to give in their votes for a selectman for the year ensuing; the said C. D. heretofore to wit, on the said fifteenth day of March, at —, aforesaid, in the public town meeting aforesaid, to the disturbance of the peaceable and quiet citizens then and there assembled as aforesaid, and in violation of the right of private suffrage, unlawfully was disorderly, and then and there unlawfully and disorderly did openly declare that the old selectman should not be chosen, and then and there unlawfully and violently did attempt repeatedly to take from the box which contained the ballots of the electors, the votes of the electors; against the peace of the State aforesaid, and contrary to the form of the statute in such case made and provided.

2. *For an offence against the law of the Road.*

That C. D. of P—, aforesaid, yeoman, heretofore, to wit, on the — day of, &c. at P—, aforesaid, was travelling with a carriage along and over a certain public highway in said town, known as the old turnpike from P— to G—, and then and there met the said A. B.

travelling in a certain other carriage; yet the said C. D., though the said A. B. did seasonably drive his carriage to the right of the middle of the travelled part of said road, did not so seasonably drive his carriage to the right of the middle part of said highway, but carelessly and unlawfully drove his said carriage along and over the middle part of said highway, with great force and violence against the carriage of the said A. B., then and there being, to the great damage of the said A. B. against the peace of said State, and contrary, &c.

XIII. PROFANITY.

The offence is "profanely cursing or swearing;" and the offender must be one who has arrived at "the age of discretion." The prosecution must be commenced within twenty days after the commission of the offence.¹

Form of a Complaint for profane swearing.

A. B. of C—, &c. upon his oath, complains that C. D. of, &c. heretofore, to wit, on, &c. at C—, aforesaid, in the county aforesaid, being a person who had arrived at the age of discretion, did profanely curse and swear, by uttering with a loud voice in the presence of divers good citizens of this State, these wicked and profane words following, to wit, [here set forth the profane oath or curse in the words in which they were uttered,] against good morals and good manners against the peace of said State, and contrary to the form of the statute in such case made and provided.

XIV. SEARCH WARRANT.

1. *Complaint.*

STATE OF MAINE.

To W. N. G. Esq., one of the justices of the peace, within and for the county of C—, A. B. of P—, in the county of C—, on oath complains and informs said justice, that the following goods and chattels, viz: [describe the property particularly,] of the property of the said complainant, and of the value of — dollars, have within — days now last past been feloniously taken, stolen, and carried away out of the possession of the said complainant, at P—, aforesaid; and that he hath probable cause to suspect, and doth suspect, that said goods and chattels were feloniously taken, stolen, and carried away as aforesaid, by C. D. of P—, in said county, and that the same goods and chattels or a part thereof, are now concealed in the dwelling house of the said C. D. occupied by him, on Middle Street in said —; and the said complainant prays that a warrant may issue, in due form of law to search there for the same, and that the said C. D. may be

¹R. S. ch. 160, sec. 22.

apprehended and held to answer to this complaint, and further dealt with, relative to the same, according to law. A. B.

Received and sworn to, on the — day of — A. D. 18—, before me, W. N. G., justice of the peace.

2. *Warrant.*

STATE OF MAINE.

C—, ss. To the sheriff of the county of C.—, his deputies, and [L. s.] to any constable of the town of P—, in said county :

Greeting.

Whereas, &c. [setting forth the complaint] you, and each of you, are hereby required, in the name of the State of Maine, forthwith, and with necessary and proper assistants, to enter in the day time into the dwelling house of the said C. D. mentioned in the said complaint and information, and there diligently to search for the goods and chattels in said information and complaint mentioned, and if the same or any part thereof shall be found upon such search, that you bring the goods and chattels so found, together with the body of the said C. D., before me, W. N. G., a justice of the peace for said county, to be disposed of and dealt with as to law and justice shall appertain. You are also alike required to summon A. B., E. F., and G. H. to appear and give evidence touching the matter contained in the said complaint, when and where you have the said goods and chattels and person, or either of them.

Given under my hand and seal, at P—, this — day of — in the year of our Lord 18—. W. N. G., justice of the peace.

XV. SPIRITUOUS LIQUORS.

The law relative to the sale of intoxicating liquors is mainly embodied in the act passed in May, 1851, entitled "An Act for the suppression of drinking houses and tippling shops." The following are its leading provisions :

1. No person is allowed at any time to manufacture or sell, by himself, his clerk, servant or agent, any spirituous or intoxicating liquors, or any mixed liquors, a part of which is spirituous or intoxicating, unless he is appointed, as the agent of the town, to sell for medicinal and mechanical purposes only.

2. The selectmen of any town, and mayor and aldermen of any city, on the first Monday of May annually, or as soon thereafter as may be convenient, may appoint some suitable person as agent to sell intoxicating liquors, to be used for medicinal and mechanical purposes, and no other ; and he shall receive such compensation for his services

as the board appointing him shall prescribe ; and shall in the sale of such liquors, conform to such rules and regulations, as the selectmen or mayor and aldermen as aforesaid, shall proscribe for that purpose. He must give bonds, and is removable at pleasure.

3. Any person who shall sell, in violation of this act, any mixed liquors, part of which is intoxicating, he shall forfeit and pay on the first conviction, ten dollars and the costs of prosecution, and stand committed until the same be paid ; on the second conviction he shall pay twenty dollars and the costs of prosecution, and stand committed until the same be paid ; on the third and every subsequent conviction, he shall pay twenty dollars and the costs of prosecution, and shall be imprisoned in the common jail, not less than three months, nor more than six months, and in default of the payment of the fines and costs, prescribed by this section, for the first and second convictions, the convict shall not be entitled to the benefit of chapter one hundred and seventy-five of the Revised Statutes, until he shall have been imprisoned two months ; and in default of payment of fines and costs provided for the third and every subsequent conviction, he shall not be entitled to the benefit of said chapter one hundred and seventy-five of the Revised Statutes, until he shall have been imprisoned four months. And if any clerk, servant, agent or other person in the employment or on the premises of another, shall violate the provisions of this section, he shall be held equally guilty with the principal, and on conviction shall suffer the same penalty.

4. Any forfeiture or penalty arising under the above section, may be recovered by an action or debt, or by complaint before any justice of the peace, or judge of any municipal or police court, in the county where the offence was committed. And the forfeiture so recovered shall go to the town where the convicted party resides, for the use of the poor ; and the prosecutor or complainant may be admitted as a witness in the trial. And if any one of the selectmen or board of mayor and aldermen shall approve of the commencement of any such suit, by endorsing his name upon the writ, the defendant shall in no event recover any costs ; and in all actions of debt arising under this section, the fines and forfeitures suffered by the defendant, shall be the same as if the actions had been by complaint. And it shall be the duty of the mayor and aldermen of any city, and selectmen of any

town, to commence an action in behalf of said town or city, against any person guilty of a violation of any of the provisions of this act, on being informed of the same, and being furnished with proof of the fact.

5. If any person shall claim an appeal from a judgment rendered against him by any judge or justice, on the trial of such action or complaint, he shall, before the appeal shall be allowed, recognize in the sum of one hundred dollars, with two good and sufficient sureties, in every case so appealed, to prosecute his appeal, and to pay all costs, fines and penalties that may be awarded against him, upon a final disposition of such suit or complaint. And before his appeal shall be allowed, he shall also, in every case, give a bond with two other good and sufficient sureties, running to the town or city where the offence was committed, in the sum of two hundred dollars, that he will not, during the pendency of such appeal, violate any of the provisions of this act. And no recognizance or bond shall be taken in cases arising under this act, except by the justice or judge before whom the trial was had; and the defendant shall be held to advance the jury fees in every case of appeal in an action of debt; and in the event of a final conviction before a jury, the defendant shall pay and suffer double the amount of fines, penalties and imprisonment awarded against him by the justice or judge from whose judgment the appeal was made. The forfeiture for all bonds and recognizances given in pursuance of this act, shall go to the town or city where the offence was committed, for the use of the poor; and if the recognizances and bonds mentioned in this section shall not be given, within twenty-four hours after the judgment, the appeal shall not be allowed; the defendant in the mean time to stand committed.

6. The mayor and aldermen of any city, and the selectmen of any town, whenever complaint shall be made to them that a breach of the conditions of the bond given by any person appointed under this act, has been committed, shall notify the person complained of, and if upon a hearing of the parties it shall appear that any breach has been committed, they shall revoke and make void his appointment. And whenever any breach of any bond given to the inhabitants of any city or town in pursuance of any of the provisions of this act, shall be made known to the mayor and aldermen, or selectmen, or shall in any man-

ner come to their knowledge, they, or some one of them shall, at the expense and for the use of said city or town, cause the bond to be put in suit in any court proper to try the same.

7. No person shall be allowed to be a manufacturer of any spirituous or intoxicating liquor, or common seller thereof, without being duly appointed as aforesaid, on pain of forfeiting on the first conviction, the sum of one hundred dollars and costs of prosecution, and in default of the payment thereof, the person so convicted shall be imprisoned sixty days in the common jail; and on the second conviction, the person so convicted shall pay the sum of two hundred dollars and costs of prosecution, and in default of payment, shall be imprisoned four months in the common jail; and on the third and every subsequent conviction shall pay the sum of two hundred dollars and shall be imprisoned four months in the common jail of the county where the offence was committed; said penalties to be recovered before any court of competent jurisdiction, by indictment, or by action of debt in the name of the city or town where the offence shall be committed. And whenever a default shall be had of any recognizance arising under this act, scire facias shall be issued, returnable at the next term, and the same shall not be continued, unless for good cause satisfactory to the court.

8. If any three persons, voters in the town or city where the complaint shall be made, shall, before any justice of the peace or judge of any municipal or police court, make complaint under oath or affirmation, that they have reason to believe, and do believe, that spirituous or intoxicating liquors are kept or deposited, and intended for sale by any person not authorised to sell the same in said city or town under the provisions of this act, in any store, shop, warehouse or other building or place in said city or town, said justice or judge shall issue his warrant of search to any sheriff, city marshal or deputy, or to any constable, who shall proceed to search the premises described in said warrant, and if any spirituous or intoxicating liquors are found therein, he shall seize the same, and convey them to some proper place of security, where he shall keep them until final action is had thereon. But no dwelling-house in which, or in part of which, a shop is not kept, shall be searched unless at least one of said complainants shall testify to some act of sale of intoxicating liquors therein, by the occupant thereof, or by his consent or permission, within at least one month of the

time of making said complaint. And the owner or keeper of said liquors, seized as aforesaid, if he shall be known to the officer seizing the same, shall be summoned forthwith before the justice or judge by whose warrant the liquors were seized, and if he fails to appear or unless he can show by positive proof, that said liquors are of foreign production, that they have been imported under the laws of the United States, and in accordance therewith—that they are contained in the original packages in which they were imported, and in quantities not less than the laws of the United States prescribe, they shall be declared forfeited, and shall be destroyed by authority of the written order to that effect, of said justice or judge, and in his presence, or in the presence of some person appointed by him to witness the destruction thereof, and who shall join with the officer by whom they have been destroyed, in attesting that fact upon the back of the order, by authority of which it was done; and the owner or keeper of such liquors shall pay a fine of twenty dollars and costs, or stand committed for thirty days, in default of payment, if in the opinion of the court said liquors, shall have been kept or deposited for the purpose of sale. And if the owner or possessor of any liquors seized in pursuance of this section, shall set up the claim that they have been regularly imported under the laws of the United States, and that they are contained in the original packages, the custom house certificates of importation and proofs of marks on the casks or packages corresponding thereto, shall not be received as evidence that the liquors contained in said packages are those actually imported therein.

9. If the owner, keeper or possessor of liquors seized under the provisions of this act, shall be unknown to the officer seizing the same, they shall not be condemned and destroyed until they shall have been advertised, with the number and description of the packages as near as may be, for two weeks, by posting up a written description of the same in some public place, that if such liquors are actually the property of any city or town in the State, and were so at the time of the seizure, purchased for sale by the agent of said city or town, for medicinal and mechanical purposes only, in pursuance of the provisions of this act, they may not be destroyed; but upon satisfactory proof of such ownership, within said two weeks, before the justice or judge by whose authority said liquors were seized, said justice or judge shall

deliver to the agent of said city or town an order to the officer having said liquors in custody, whereupon said officer shall deliver them to said agent, taking his receipt therefor upon the back of said order, which shall be returned to said justice or judge.

10. If any person claiming any liquors, seized as aforesaid, shall appeal from the judgment of any justice or judge by whose authority the seizure was made, to the district court, before his appeal shall be allowed, he shall give a bond in the sum of two hundred dollars with two good and sufficient sureties to prosecute his appeal, and to pay all fines and costs which may be awarded against him; and in the case of any such appeal, where the quantity of liquors so seized shall exceed five gallons, if the final decision shall be against the appellant, that such liquors were intended by him for sale, he shall be adjudged by the court a common seller of intoxicating liquors, and shall be subject to the penalties provided for in section eight of this act; and said liquors shall be destroyed as provided for in section eleven. But nothing contained in this act shall be construed to prevent any chemist, artist or manufacturer in whose art or trade they may be necessary, from keeping at his place of business such reasonable and proper quantity of distilled liquors as he may have occasion to use in his art or trade, but not for sale.

11. It shall be the duty of any mayor, alderman, selectman, assessor, city marshal or deputy or constable, if he shall have information that any intoxicating liquors are kept or sold in any tent, shanty, hut or place of any kind for selling refreshments in any public place, on or near the ground of any cattle show, agricultural exhibition, military muster or public occasion of any kind, to search such suspected place, and if such officer shall find upon the premises any intoxicating drinks, he shall seize them, and arrest the keeper or keepers of such place, and take them forthwith, or as soon as may be, before some justice or judge of a municipal or police court, with the liquors so found and seized, and upon proof that said liquors are intoxicating, that they were found in possession of the accused, in a tent, shanty, or other place as aforesaid, he or they shall be sentenced to imprisonment in the county jail for thirty days, and the liquors so seized shall be destroyed by order of said justice or judge.

12. If any person arrested under the preceding section and sentenced as aforesaid, shall claim an appeal, before his appeal shall be allowed, he shall give a bond in the sum of one hundred dollars, with two good and sufficient sureties, that he will prosecute his appeal and pay all fines, costs and penalties which may be awarded against him. And if on such appeal the verdict of the jury shall be against him, he shall, in addition to the penalty awarded by the lower court, pay a fine of twenty dollars. In all cases of appeal under this act from the judgment of a justice or judge of any municipal or police court, to the district court, except where the proceeding is by action of debt, they shall be conducted in said district court by the prosecuting officer of the government—and said officer shall be entitled to receive all costs taxable to the State in all criminal proceedings under this act, in addition to the salary allowed to such officer by law—but no costs in such cases shall be remitted or reduced by the prosecuting officer or the court. In any suit, complaint, indictment or other proceeding against any person for a violation of any of the provisions of this act other than for the first offence, it shall not be requisite to set forth particularly the record of a former conviction, but it shall be sufficient to allege briefly that such person has been convicted of a violation of the fourth section of this act, or as a common seller, as the case may be, and such allegation in any civil or criminal process in any stage of the proceedings, before final judgment, may be amended without terms and as matter of right.

13. All payments or compensations for liquors sold in violation of law, whether in money, labor or other property, either real or personal, shall be held and considered to have been received in violation of law, and without consideration, and against law, equity and a good conscience, and all sales, transfers and conveyances, mortgages, liens, attachments, pledges and securities of every kind, which either in whole or in part, shall have been for or on account of spirituous or intoxicating liquors, shall be utterly null and void against all persons and in all cases, and no rights of any kind shall be acquired thereby; and in any action either at law or equity, touching such real or personal estate, the purchaser of such liquors may be a witness for either party. And no action of any kind shall be maintained in any court in this State, either in whole or in part for intoxicating liquors, sold

in any other State or country whatever, nor shall any action of any kind be had or maintained in any court in this State, for the recovery or possession of intoxicating or spirituous liquors, or the value thereof.

14. The provisions of this act relating to towns, are applicable to cities and plantations; and those relating to selectmen are also applied to the mayor and aldermen of cities and assessors of plantations.

15. By the act of 1851, the act entitled "an act to restrict the sale of intoxicating drinks," approved August sixth, one thousand eight hundred and forty-six, was repealed, except the thirteen sections from section ten to section twenty-two, inclusive, and all other acts and parts of acts inconsistent with that of 1851, were also repealed.

1. *Complaint for selling.*

STATE OF MAINE.

C—, ss. To A. B., Esquire, of —, one of the justices in and for said county; C. D. of —, on the — day of — in the year of our Lord one thousand eight hundred and fifty — in behalf of said State, on oath complains, that E. F. of —, in said county, on the — day of —, at said —, not being appointed by the selectmen of said town, as the agent of said town, to sell therein spirits, wines, or other intoxicating liquors, did sell a quantity of spirituous liquors therein to wit: [here describe as accurately as possible] against the peace of the State, and contrary to the form of the statutes in such case made and provided. (Signed) C. D.

On the — day of — aforesaid, the said C. D. makes oath that the above complaint, by him signed, is true.

Before

A. B., justice of the peace.

2. *Warrant on the above complaint.*

STATE OF MAINE.

C—, ss. To the sheriff of our said county of C—, or either of his [L. s.] deputies, or either of the constables of the town of —, Greeting.

Whereas, C. D. of —, on the — day of —, A. D. 185—, in behalf of said State, on oath complained to A. B., of —, Esquire, one of the justices in and for said county, that E. F. of —, in said county, on the — day of —, at said —, not being appointed by the selectmen of said town, as the agent of said town, to sell therein, spirits, wines, or other intoxicating liquors, did sell a quantity of spirituous and intoxicating liquors to wit, [here describe in the language of the complaint.] Therefore, in the name of said State, you are

commanded to apprehend, forthwith, the said E. F., if he may be found in your precinct, and him bring before me, at —, in said —, to answer to said State upon the complaint aforesaid.

Witness, A. B., Esq. justice of the peace, at —, aforesaid, this — day of —, A. D. 185—. A. B., justice of the peace.

3. *Complaint of three voters that a certain person keeps liquors intended for sale.*

STATE OF MAINE.

C—, ss. To A. B. of —, Esquire, one of the justices of the peace in and for said county of C—; C. D., E. F. and G. H., [L. S.] being voters in said —, on the — day of —, A. D. 185—, in behalf of the State, on oath complain, that J. K. of —, in said county, now has and keeps spirituous and intoxicating liquors, deposited and intended for sale, in the shop, [or other place, as the case may be] situated in said —, occupied by him, said J. K., not being appointed by the selectmen of said —, as the agent thereof, to sell therein, spirits, wines, or other intoxicating liquors; whereby said liquors have become forfeited to be destroyed, and said J. K. has forfeited the sum of twenty dollars, to the use of said State, and costs of prosecution.

The complainants therefore pray that due process may issue to search there for the same, and that if such liquors be found therein, the same be seized and safely kept until final action and decision be had hereon.

C. D., }
E. F., }
G. H. }

On the — day of — aforesaid, the said C. D., E. F. and G. H., make oath that they have cause to believe and do believe the above complaint, by them signed, is true.

Before

A. B., justice of the peace.

4. *Warrant ou the above complaint.*

STATE OF MAINE.

C—, ss. To the sheriff of our said county of C—, or either of his deputies, or either of the constables of the town of —, or [L. S.] the marshal or any deputy marshal in the city of —,

Greeting.

Whereas, C. D., E. F. and G. H., being voters in said —, on the — day of —, in the year 185—, in behalf of said State, on oath complained to me, A. B. of —, Esquire, one of the justices of the peace in and for the county of C—, that J. K. of —, in said county, then had and kept spirituous and intoxicating liquors, deposited and intended for sale in the shop, [or other place] situated in said —,

occupied by him, said J. K. ; said J. K. not being appointed by the selectmen of said —, as the agent thereof, to sell therein, spirits, wines or other intoxicating liquors ; whereby said liquors have become forfeited to be destroyed, and said J. K. has forfeited the sum of twenty dollars for the use of said State, and costs of prosecution, and pray that due process may issue to search there for the same. Therefore, in the name of the State, you are required to enter, in the day time, the shop [or other place] named in said complaint, and search there for the same, and if such liquors be found therein, to seize and safely keep the same until final decision be had on said complaint, and that you summon said J. K. forthwith to appear before me, at —, in said —, on the — day of —, at — o'clock in the — noon, to show cause, if any he have, why said liquors should not be declared forfeited and be destroyed, and he be adjudged and held to pay a fine of twenty dollars to the use aforesaid, and costs of prosecution. And make return hereof with your doings thereon, to me, at the time aforesaid.

Witness A. B. of —, Esquire, at — aforesaid, this — day of —, A. D. 185—. A. B., justice of the peace.

III. FORMS AND PRECEDENTS FOR COMPLAINTS OF OFFENCES NOT WITHIN THE FINAL JURISDICTION OF JUSTICES OF THE PEACE.

Many forms for such complaints have already been given in the preceding pages. These it would be worse than useless to repeat. Those which follow in this connection are given without any remarks upon the several offences they are intended to set forth, because it is not within the province of the magistrate to adjudicate actually and finally upon the guilt of the accused. He is called upon only to determine the probable connection of the prisoner with the alleged offence.

I. ADULTERY.

1. *Form of a Complaint for adultery, by a married man with an unmarried woman.*

A. B. of —, in the county of C—, yeoman, upon his oath, complains that C. D. of —, in the county of C—, yeoman, on the — day of —, now last past, at — aforesaid, in the county aforesaid, did commit the crime of adultery with one E. F. of said —, spinster ; by then and there having carnal knowledge of the body of her the said E. F., he the said C. D. being then and there a married man, and having a lawful wife alive, against the peace of said State, and contrary to the form of the statute in such case made and provided.

II. ABORTION.

1. *Form of a Complaint at common law, for administering a potion to cause an abortion.*

A. B. of —, in the county of C—, upon his oath, complains that C. D. of —, in the county of C—, on the — day of — now last past, with force and arms, at — aforesaid, in the county aforesaid, did wilfully, and maliciously, and without lawful justification, administer to, prescribe for and direct to be taken by one E. F., single woman, then and there being pregnant with child, divers large quantities of a certain noxious and destructive substance, called *savin*, with intent thereby to cause and produce the abortion, miscarriage, and premature birth of the said child, with which she the said E. F. was then and there pregnant and quick; by means whereof, the abortion, miscarriage, and premature birth of the said child was caused and produced, and she the said E. F. afterwards, to wit, on the — day of — next following, at said —, by means of the noxious and destructive substance aforesaid, so as aforesaid administered by the said C. D., and taken by the said E. F., was prematurely delivered of the same child; [if the woman died thereby, add, “by means and in consequence whereof the said E. F. afterwards, to wit, &c. died,”] against the peace and dignity of the State aforesaid, &c.

2. *For causing an abortion by an instrument.*

A. B. of —, in the county of —, upon his oath, complains, that C. D. of —, in the county of C—, on the — day of — now last past, with force and arms at — aforesaid, in the county aforesaid, did unlawfully, wickedly, and inhumanly, force and thrust a certain instrument called a —, which he the said C. D. in his right hand then and there had and held, up and into the womb and body of one E. F., she, the said E. F. being then and there pregnant and quick with child, with a wicked intent to cause and procure the said E. F. to miscarry and to bring forth the said child, of which she was then and there, as aforesaid, pregnant and quick; and that she the said E. F. afterwards, to wit, on the — day of — then next ensuing, at — aforesaid, by means of the forcing and thrusting of the said instrument into the womb and body of her the said E. F. by the said C. D. in manner aforesaid, did bring forth the said child, (of which she was so pregnant and quick,) dead. [If the woman died thereby, add, “by means and in consequence whereof the said E. F. afterwards, to wit, &c. died,”] against the peace of the State, and contrary to the form of the statute in such case made and provided.

III. ABDUCTION.

Against a person for enticing an unmarried woman from her father's house.

A. B. of, &c. upon his oath complains, that C. D. of, &c. heretofore, to wit, on, &c. at, &c. one E. F. then and there being an unmarried woman, of a chaste life and conversation, did then and there deceitfully and wickedly entice and take away from the house of one J. F., the father of the said E. F., situate in — aforesaid, for the purpose of prostitution at a house of ill fame; against good morals and good manners, against the peace of said State, and contrary to the form of the statute in such case made and provided. Wherefore, &c.

IV. ARSON AND OTHER BURNINGS.

1. *Burning an inhabited dwelling house in the night time.*

That C. D. of, &c. heretofore, to wit, on, &c. about the hour of two in the night of the same day, with force and arms, at — aforesaid, a certain dwelling house of one E. F. there situate, feloniously, wilfully and maliciously did set fire to, in the night time, and the same then and there did burn, there being then and there at the time of committing said offence, one person lawfully in the said dwelling house so burnt, against the peace of the said State, and contrary to the form of the statute in such case made and provided.

2. *For setting fire to a building, whereby a dwelling house was burnt in the night time.*

That C. D. of —, in the county aforesaid, laborer, on the — day of — now last past, about the hour of two in the night of the same day, with force and arms, at —, aforesaid, in the county aforesaid, a certain building of one E. F., there situate, called a wood-house, feloniously, wilfully and maliciously did set fire to, and that by the kindling of said fire, and by the burning of said wood-house, the dwelling house of him the said A. B. there also situate, was then and there, in the night time, feloniously, wilfully and maliciously burnt and consumed; against the peace of said State, and contrary to the form of the statute in such case made and provided.

8. *Burning a dwelling house in the day time.*

That C. D. heretofore, to wit, on, &c. about the hour of two in the day time of the same day, with force and arms, at — aforesaid, feloniously, wilfully and maliciously did set fire to the dwelling house of one G. S., there situate, in the day time, and the same then and there did burn; against the peace, &c.

4. *For maliciously burning a meeting house in the night time.*

A. B. of —, in the county aforesaid, yeoman, upon his oath complains that C. D. of —, in the county aforesaid, laborer, on the — day of — now last past, with force and arms, at — aforesaid, in the county aforesaid, a certain meeting house there situate, belonging to the first parish in the said town of —, and erected for public uses, to wit: for the public worship of God, did then and there, in the night time, wilfully and maliciously set fire to, burn and consume; against the peace of said State, and contrary to the form of the statute in such case made and provided.

5. *For burning a building erected for a dwelling house, and not completed or inhabited.*

That C. D. of, &c. heretofore, to wit, on the — day of — in the year —, with force and arms, about the hour of twelve o'clock in the night time of the same day, a building of one P. U. of said —, there situate, erected by the said P. U. for a dwelling house, and not completed or inhabited, wilfully and maliciously did set fire to, and the same building, so erected for a dwelling house, then and there, by the setting and kindling of such fire, did wilfully and maliciously burn and consume; against the peace of said State, and contrary to the form of the statute in such case made and provided.

V. BARRETRY.

Form of a complaint, for being a common barretor.

That C. D. of —, in the county of C—, Esquire, on the — day of — in the year —, and on divers other days and times, as well before as afterwards, was, and yet is a common barretor; and that he the said C. D. on the said — day of —, and on divers other days and times, as well before as afterwards, in the county aforesaid, divers quarrels, strifes, suits and controversies, among the honest and quiet citizens of the said State, then and there did move, procure, stir up, and excite; to the evil example of all others in like cases to offend, and against the peace and dignity of the State aforesaid.

VI. BLASPHEMY.

That C. D., of, &c., not having the fear of God before his eyes, and intending to blaspheme and dishonor the holy name of God, heretofore, to wit, on, &c., at, &c., wilfully and blasphemously, in the presence and hearing of divers good citizens of said State, spoke, pronounced, and with a loud voice published these profane and blasphemous words following, that is to say, [setting forth the words verbatim,] in contempt and blasphemy of the holy name of God, against the peace of

said State, and contrary to the form of the statute in such case made and provided.

VII. BRIBERY AND EMBRACERY.

1. *For attempting to bribe a justice of the peace, to give a decision in favor of the plaintiff in an action pending before him.*

That C. D. of, &c. heretofore, to wit, on, &c., at —, aforesaid, was one of the justices assigned to keep the peace in said county, duly qualified, appointed and sworn to discharge the duties of said office,* and that E. F. of, &c., on the same day at —, aforesaid, well knowing the premises, but unlawfully intending to corrupt the said C. D., and influence the decision and judgment of the said C. D. in a certain cause then and there pending before the said C. D. in his said official capacity, wherein the said E. F. was plaintiff, and one G. H. was defendant, did then and there unlawfully and corruptly give and offer, and cause to be given and offered to said C. D. a certain sum of money, to wit, the sum of — dollars, as a gift and reward, to induce and influence the said C. D. to prostitute and betray the duties of his said office, by unjustly and wickedly rendering judgment in said suit, in his said official capacity, for the said E. F. for the sum of — dollars; against the peace of the State, &c.

2. *Against a justice of the peace for accepting a bribe from the plaintiff, in an action pending before him.*

[As before to*.] And that he the said C. D. contriving and intending the duties of his said office, and the trust and confidence thereby reposed in him, to prostitute and betray, did then and there unlawfully and corruptly accept and receive of one E. F. the sum of — dollars, as a gift and gratuity to influence and induce him the said C. D. and under the agreement and with the understanding that he the said C. D. should in a certain action then and there pending before him the said C. D. in his said official capacity, wherein the said E. F. was plaintiff, and one G. H. was defendant, render judgment in favor of the said E. F. for the sum of — dollars; and that he, the said C. D., did thereby wilfully, unlawfully and corruptly prostitute and betray, for the said gift and gratuity by him the said C. D. in his said official capacity, in that behalf, so as aforesaid accepted, the duties of his said office, and the trust and confidence reposed in him therein; to the great dishonor, scandal and prostitution of the justice of said State, against the peace of the same, &c.

3. *A complaint for embracery.*

That C. D. of P—, &c. heretofore, to wit, on the — day of — now last past, at P— aforesaid, in the county aforesaid, knowing that a jury of the said county of C—, was then duly returned, sworn and

impannelled, to try a certain issue joined in the supreme judicial court, then held according to law, at P— aforesaid, in and for the county of C— aforesaid, between E. F., plaintiff, and G. H. defendant, in a plea of the case; and then also knowing that a trial was to be had upon the said issue, on the — day of — in the year aforesaid, before the said supreme judicial court, then and there held for the said county of C—, the said C. D. devising wickedly and unlawfully to bias the opinion and influence the decision of the jurors aforesaid, on the — day of —, in the year aforesaid, at P—, in the county aforesaid, unlawfully, wickedly, unjustly and corruptly, on behalf of the said G. H., the defendant in the said cause, did offer and give to one I. J., one of the jurors of the said jury, the sum of — dollars, as a gift and gratuity to induce the said I. J. to appear and attend in favor of the said G. H., the said defendant; and to bias the opinion and influence the decision of the said jurors in the trial of the said issue, he the said C. D. well knowing that the said I. J. was then and there a juror as aforesaid, sworn to try the said issue; against the peace and dignity of the State, &c.

VIII. BURGLARY AND HOUSEBREAKING.

1. *For breaking and entering a dwelling house in the night time, being armed.*

That C. D. of, &c. on, &c. about the hour of one in the night of the same day, with force and arms, at —, aforesaid, in the county aforesaid, the dwelling house of A. B. there situate, feloniously and burglariously did break and enter, in the night time, he the said A. B. being then lawfully therein, and he the said C. D. then and there being armed with a dangerous weapon, to wit, with a pistol loaded with gunpowder and a leaden bullet, with intent the goods and chattels of the said A. B. in the said dwelling house then and there being, then and there feloniously and burglariously to steal, take and carry away,* and then and there, with force and arms, one silver tankard, of the value of thirty dollars, of the goods and chattels of him the said A. B. in the same dwelling house then and there being found, then and there feloniously and burglariously did steal, take and carry away, against the peace of the said State, &c.

The above form may be easily varied to meet the several cases of burglary provided for in the statute. Thus, if the offender have committed an assault within the dwelling house, the following words may be inserted after the *.

“ And that he the said C. D., then and there in and upon one E. F., who was lawfully then and there in the said dwelling house, and in the peace of the said State, feloniously and burglariously an actual

assault did make, and him, the said E. F. did then and there beat, wound and abuse."

If it be alleged that the defendant armed himself with a weapon in the house, the words about being armed at the time of the entry, may be omitted, when insert instead thereof after the * as follows :

" And that he, the said C. D., having then and there, in the dwelling aforesaid, armed himself with a certain dangerous weapon, called —, one silver tankard, &c."

Unless some of these aggravations are to be charged, instead thereof the words, " not being armed," may be used.

2. For breaking in the night a shop, not adjoining a dwelling house, with intent to steal.

That C. D., of, &c. heretofore, to wit, on, &c. about the hour of ten in the afternoon of the same day, with force and arms, at — aforesaid, the shop of one A. B. there situate, not adjoining to, or occupied with, a dwelling house, feloniously did break and enter, in the night time, with intent to commit the crime of larceny, by stealing, taking and carrying away of the goods and chattels of one J. S., then and there being, against the peace of said State, and contrary to the form of the statute in such case made and provided.

3. For entering a house in the night time without breaking, and putting the owner in fear.

That C. D. of, &c. heretofore, to wit, on, &c. in the night time, to wit, about the hour of ten in the afternoon of the same day, with force and arms, at — aforesaid, the dwelling house of one A. B. there situate, feloniously did enter, without breaking, with intent to commit the crime of larceny, of the goods and chattels of him the said A. B., then and there being, and him the said A. B. then and there being lawfully therein, did then and there put in fear; against the peace of said State, and contrary to the form of the statute in such case made and provided.

4. For a like entry without putting in fear.

That C. D. of, &c. heretofore, to wit, on, &c. about the hour of ten in the afternoon of the same day, with force and arms, at — aforesaid, the dwelling house of one A. B., there situate, feloniously did enter in the night-time, without breaking, with intent to commit the crime of larceny, no person then and there lawfully therein being put in fear, against the peace of said State, and contrary to the form of the statute in such case made and provided.

5. *For a burglary, against the principal and accessories before the fact.*

[Draw the complaint against the principal according to the foregoing precedents, as the case may require, and then proceed :] And the said A. B., upon his oath aforesaid, further complains, that E. F. of, &c. before the committing of the said felony and burglary, in manner and form aforesaid, to wit, on the — day of — in the year aforesaid, with force and arms, at — aforesaid, in the county aforesaid, did feloniously and maliciously incite, move, procure, aid, and abet, counsel, hire, and command the said C. D. to do and commit the said felony and burglary, in manner and form aforesaid; against the peace of said State, and contrary to the form of the statute in such case made and provided. Wherefore, &c.

6. *Against an accessory to a burglary after the fact.*

[Draw the complaint against the principal conformably to the foregoing precedents, as the case may be, and then proceed as follows :] And the said A. B. further complains, that E. F. of said —, afterwards, to wit, on the — day of —, in the year aforesaid, with force and arms, at — aforesaid, in the county aforesaid, well knowing the said C. D. to have done and committed the felony and burglary in form aforesaid, him the said C. D. then and there did knowingly harbor, conceal, maintain, and assist; against the peace of said State, and contrary to the form of the statute in such case made and provided.

IX. CHEATING AND OBTAINING GOODS OR MONEY UNDER FALSE PRETENCES.

1. *For selling by false weights and measures.*

That C. D. of, &c. heretofore, to wit, on, &c. and from thence until the filing of this complaint, did use and exercise the trade and business of a shopkeeper, and during that time did deal in the buying and selling by weight of divers goods, wares and merchandize, to wit, at, &c. and the said C. D. being a person of a wicked and depraved mind, and contriving and fraudulently intending to cheat and defraud the people of this State whilst he used and exercised his said trade and business, to wit, on the said — day of —, and on divers other days and times between that day and the day of the filing of this complaint, at — aforesaid, did knowingly, wilfully, and publicly keep in a certain shop there, wherein he the said C. D. did carry on his said trade, a certain false pair of scales, for the weighing of goods, wares and merchandize, by him sold in the way of his said trade; which said scales were then and there, by artful and deceitful ways and means, so made and constructed as to cause the goods, wares and merchandize weighed

therein, and sold thereby, to appear of greater weight than the real or true weight by one eighth part of such apparent weight; and that he, the said C. D. heretofore, to wit, on the said — day of —, at —, aforesaid, (then and there knowing the said scales false as aforesaid) did knowingly, wilfully and fraudulently sell and utter to one G. H., one of the citizens of this State, certain goods in the way of his said trade, to wit, a large quantity of flour weighed in and by the said false scales as and for one hundred pounds weight of flour, whereas, in truth, the weight of the said flour, so sold as aforesaid, was short and deficient of the said weight of one hundred pounds, by one eighth part of the said weight of one hundred pounds, to wit, —, against the peace, &c.

2. *For obtaining money under false pretences.*

That C. D. of, &c. contriving and intending unlawfully, fraudulently, designedly and deceitfully to cheat and defraud the said A. B. of his moneys, heretofore, to wit, on, &c. at — aforesaid, unlawfully, knowingly and designedly did falsely pretend to the said A. B., that one E. F. was a gentleman of property, residing at —, in the county of C—, and that the said E. F. would accept and pay a certain bill of exchange in writing, then and there drawn by the said C. D. upon the said E. F., and dated the day and year last aforesaid, and whereby the said C. D. required the said E. F. to pay to him the said A. B., or order, the sum of one hundred dollars, in six days after date thereof, and to place the same to account of him the said C. D., and then and there delivered the same to the said A. B.; by which said false pretence, the said C. D. did afterwards, to wit, on the — day of —, in the year aforesaid, at — aforesaid, unlawfully, knowingly, and designedly obtain from the said A. B. the said sum of one hundred dollars, of the money of him the said A. B., with intent then and there to defraud him of the same: whereas in truth and in fact, the said E. F. was not then a gentleman of property, residing at —, in the county of C—, and whereas in truth and in fact the said E. F. was then and there a pauper, chargeable to, and maintained by the town of —, and whereas in truth and in fact, the said E. F. did not and could not, nor would pay the said bill of exchange, or any part of the money therein mentioned, but was then wholly insolvent and unable to pay the same, which the said C. D. then and there well knew; to the great damage of him the said A. B., against the peace of said State, &c.

X. CONSPIRACY.

1. *Conspiracy to charge a man with receiving stolen goods, knowing them to be stolen, and obtaining money for compounding the same.*

A. B. of —, in the county aforesaid, yeoman, upon his oath complains, that C. D., E. F. and G. H., all of —, in the county

aforesaid, laborers, being evil disposed persons, and wickedly devising and intending the said A. B. unjustly to deprive of his credit and good name, and also fraudulently to obtain and acquire to themselves of and from the said A. B. divers large sum of money, on the — day of —, with force and arms, at — aforesaid, in the county aforesaid, did wickedly, fraudulently, and maliciously conspire, combine, confederate and agree among themselves falsely to charge and accuse the said A. B. that he had then lately before received certain goods which had then been lately before feloniously stolen, taken and carried away, knowing them to be stolen; and that they, the said C. D., E. F., and G. H., by divers threats, menaces, and allegations of them, the said C. D., E. F. and G. H., made and uttered in pursuance of the said conspiracy, combination, confederacy and agreement aforesaid, that the said A. B. should be prosecuted and punished as a receiver of stolen goods, knowing them to be stolen, afterwards, to wit, on the — day of —, in the year aforesaid, at — aforesaid, did demand, receive, and take the sum of fifty dollars, of him the said A. B., for and as a composition of, and agreement not to prosecute the same pretended offence, and to discharge him the said A. B. from all further prosecution for the same; to the great damage of him the said A. B., and against the peace and dignity of the said State. Wherefore, &c.

XI. ESCAPES, REFUSING TO AID OFFICERS, AND THE LIKE OFFENCES,
UNDER REVISED STATUTES, CHAPTER 158.

1. *For conveying files into a prison in order to aid the escape of a prisoner.*

That, heretofore, to wit, on, &c. at, &c. E. F., Esq. then being one of the justices assigned, commissioned to keep the peace in and for said county of C—, did make his warrant of commitment under his hand and seal, bearing date the day and year aforesaid, directed (among other things) to the keeper of the jail in said county, and thereby requiring the said keeper to receive into his custody the body of one C. D., who was therewith sent to him the said keeper (the said C. D. having been brought before him the said justice, charged upon the oath of A. B. with having feloniously stolen, taken and carried away, from and out of a barn of the said A. B., situate at — aforesaid, a quantity of barley of the value of three dollars, the property of him the said A. B.) and him safely to keep until he should be discharged from thence by due course of law; by virtue of which commitment he, the said C. D., afterwards, to wit, on the same day and year aforesaid, was conveyed, committed and delivered to the said jail for the said cause in the said warrant of commitment mentioned; and was kept and detained therein under the custody of one G. M. then being keeper of said jail, for the cause aforesaid. And the complainant further shows that

J. B. of, &c. well knowing the premises, and intending to facilitate the escape of the said C. D. from the said jail, afterwards, to wit, on, &c. with force and arms at — aforesaid, feloniously did convey and cause to be conveyed into said jail two steel files, being instruments useful and adapted to aid the said C. D. in making his escape from the said jail, and the said files did then and there unlawfully and feloniously deliver and cause to be delivered to the said C. D., there lawfully committed and detained as aforesaid, without the consent and privity of the said G. M. or any other under-keeper of said jail; against the peace of the State, and contrary to the form of the statute in such case made and provided.

2. *Against a jailer for suffering a voluntary escape from prison.*

That at the supreme judicial court, begun and holden at [here set forth the time, &c. of holding the court,] one C. D. was duly and legally convicted of the crime of larceny in feloniously stealing, taking, and carrying away fifty pounds of tea, of the value of thirty dollars of the goods and chattels of one E. F. Whereupon it was considered and adjudged by the said court, that the said C. D. should be imprisoned [here set forth the sentence of the court.] And the said A. B., upon his oath aforesaid, further complains, that afterwards, at the supreme judicial court above mentioned, the said C. D., by order of the said court, was committed to the care and custody of G. H., then and still being the keeper of the jail, situated at — aforesaid, there to be kept and imprisoned in the said jail, according to, and in pursuance of the order and sentence aforesaid; and the said G. H. him the said C. D. in his custody then and there had for the cause aforesaid, he the said C. D. having stood charged and been committed as aforesaid of the aforesaid felony and larceny, and thereupon committed as a prisoner as aforesaid to him the said G. H.; and the said A. B. upon his oath aforesaid, further complains, that the said G. H. of said —, Esq. afterwards and before the expiration of the term for which the said C. D. was so as aforesaid ordered to be imprisoned, to wit, on the — day of — now last past, at —, in the county aforesaid, unlawfully, voluntarily, and contemptuously did permit and suffer the said C. D. to escape and go at large out of the said jail; contrary to the duty of him the said G. H., and against the peace of said State, and contrary to the form of the statute in such case made and provided.

The same form is to be used in the case of a negligent escape, substituting the word “negligently” for the word “voluntarily,” toward the close of the complaint.

3. *Against a constable for refusing to arrest a man and suffering him to escape.*

That on the — day of — now last past, at —, in the said county of —, one C. D. came before E. F., Esq. then one of the

justices of the peace in and for the said county of C—, duly and legally qualified and empowered to discharge and perform the duties of said office; and the said C. D. did then and there, on his oath before said justice, charge, accuse, and complain, that one G. H. of — aforesaid, laborer, [here set forth the complaint.] Whereupon such proceedings were had, that the said justice did then and there make a certain warrant under his hand and seal, in due form of law, directed to the sheriff of the said county of —, or his deputy, or to any of the constables of the town of —, in the county aforesaid, thereby requiring them and each of them to take the body of the said G. H. and bring him before the said E. F., Esq. the justice aforesaid, to be dealt with touching the said complaint, as to law and justice might appertain; which said warrant afterwards, on the day and year aforesaid, at —, aforesaid, was delivered to I. J. of said —, in the county aforesaid, yeoman (he being then and there one of the constables of the said town of —, duly appointed, qualified, and sworn to discharge and perform the duties of said office,) in due form of law to be by him served and executed.* Nevertheless, the said I. J., on the said — day of —, in the year aforesaid, at —, in the county aforesaid, the duties of his office in that respect not regarding, unlawfully and negligently, did wilfully and corruptly omit and delay to execute the said process as delivered to him, whereby the said G. H. did escape and go at large wheresoever he would, out of the custody of him the said I. J.; against the peace and dignity of the State, and contrary to the form of the statute in such case made and provided.

4. *For refusing to aid an officer when required.*

[As in the last to *] and the said I. J. afterwards, to wit, on, &c. at, &c. in the execution of his said office, required of J. S. of, &c. in the name of the said State, suitable aid in apprehending the said G. H., according to the command of the said warrant; yet the said J. S., though thereto so required and well knowing the premises, on the said — day of —, at — aforesaid, wilfully, unlawfully and corruptly neglected and refused to aid and assist the said I. J., in the execution of his said office in apprehending the said G. H.; against the peace, &c. and contrary to the form, &c.

The facts in a complaint for refusing to aid a justice may be set forth much in the same manner.

XII. EXTORTION.

1. *Against a sheriff for extortion.*

That C. D., of, &c., and a deputy sheriff for said county duly commissioned and qualified to serve writs and processes in civil actions

heretofore, to wit, on, &c., at, &c. intending to injure the said A. B., by color of his said office, did wilfully, corruptly and extorsively demand and receive of the said A. B., a greater fee and compensation than is established, allowed and provided by law for the service of a certain writ then delivered and committed to him the said C. D., for service, wherein the said A. B. was plaintiff and one E. F. defendant, to wit, the sum of one dollar for the service thereof, which said sum is greater than the sum allowed and provided by law for the said service; against the peace of said State, and contrary to the form of the statute in such case made and provided.

The same mode may be adopted in all cases of this offence, stating the facts, and bringing them within the statute.

2. *For an attempt to extort money by a threatening letter.*

That C. D. of, &c. heretofore, to wit, on, &c., at — aforesaid, intending to extort money from A. B., of &c. against the will of him the said A. B., a certain letter and written communication did write to the said A. B., therein maliciously threatening an injury to the person of the said A. B., which said letter was of the words and figures following, to wit, [here set forth the letter verbatim,] and the same did then direct to the said A. B. by his direction at — aforesaid, and did then and there cause the same to be sent and delivered to the said A. B., through the public post-office in the said town of —, against the peace of said State, &c.

XIII. FORGERY AND COUNTERFEITING.

The several offences of this nature are defined in the one hundred and fifty-seventh chapter of the Revised Statutes.

1. *For forging a bond, under the first section of the statute.*

That C. D. of said —, heretofore, to wit, on &c. on the — day of — now last past, at — aforesaid, in the county aforesaid, did falsely make, forge, and counterfeit, and did procure to be falsely made, forged, and counterfeited,* a certain writing obligatory for the payment of money, purporting to be made and sealed by one E. F. for the sum of — dollars; which said false, forged, and counterfeit writing obligatory is of the following purport and effect, to wit, [here insert a copy of the bond in the words and figures of it verbatim,] with intent him the said A. B. to injure and defraud; against the peace of said State, and contrary to the form of the statute in such case made and provided. Wherefore, &c.

2. *Uttering a forged instrument, under the second section.*

That C. D. of said —, heretofore, to wit, on the — day of — now last past, at — aforesaid, in the county aforesaid, had in his custody and possession a certain false, forged, and counterfeit promissory note for the payment of money, purporting to be made and signed by one E. F. for the sum of — dollars; which said false, forged, and counterfeit promissory note is of the following purport and effect, to wit, [here insert a correct copy of the forged note, in words and figures;] and that he the said C. D. the aforesaid false, forged, and counterfeit promissory note did then and there utter and publish as true, with intent him the said A. B. to injure and defraud, he the said C. D. then and there well knowing the aforesaid promissory note to be false, forged, and counterfeit; against the peace of said State, and contrary to the form of the statute in such case made and provided.

3. *Forging a certificate of a public debt, under the third section.*

That C. D. of said —, heretofore, to wit, on, &c. on the — day of — now last past, at P— aforesaid, in the county aforesaid, did falsely make, forge, and counterfeit, and did procure to be falsely made, forged, and counterfeited, a certain note, [or certificate, or other bill of credit, as the case may be,] purporting to be a note which had been duly issued by the treasurer of the State, thereto duly authorized, for a debt of this State; which said false, forged, and counterfeit note is of the purport and effect following, to wit, [here insert an exact copy of the note in words and figures,] with intent to injure and defraud; against the peace of said State, and contrary to the form of the statute in such case made and provided. Wherefore, &c.

4. *Forging a bank bill of a banking company within this State, under the fourth section.*

[As in No. 1, to *] A certain bank bill, purporting to be payable to the bearer thereof, and to be signed in behalf of the president, directors, and company of the Bank of Cumberland, the same being an incorporated banking company within this State, which said false, forged, and counterfeit bank bill is of the purport and effect following, [here insert an exact copy of the forged bill in words and figures,] with intent to injure and defraud; against the peace of the State, and contrary to the form of the statute in such case made and provided.

5. *For having in possession ten or more counterfeit bills, with intent to pass the same, under the fifth section.*

That C. D. of said P—, heretofore, to wit, on the — day of — now last past, at P— aforesaid, in the county aforesaid, had in his possession at the same time ten similar false, forged, and counterfeit bank

bills, purporting to be ten bills, payable to the bearers thereof, and to be signed in behalf of the president, directors, and company of the Casco Bank, an incorporated banking company within this State, each of which said bank bills was of the purport and effect following, &c. said C. D. then and there, knowing them and each of them the said bills, to be false, forged, and counterfeit, as aforesaid, with intent to utter and pass the same, and thereby to injure and defraud the president, directors, and company of the said Casco Bank; against the peace of said State, and contrary to the form of the statute in such case made and provided.

6. *For having counterfeit bills with intent to pass the same, under the sixth section.*

That C. D. of said —, heretofore, to wit, on, &c. had in his possession a certain false, forged, and counterfeit bill and note, in the similitude of the bills and notes payable to the bearer thereof, issued by and for the Atlantic Bank, the same being a bank and banking company legally established within this State; to wit, at, &c. which said false, forged, and counterfeit bill and note is of the following purport and effect, to wit, [here insert an exact copy of the counterfeit note in words and figures ;] and that he the said C. D. the aforesaid false, forged, and counterfeit note, in his hands, custody, and possession, then and there had and kept, for the purpose of rendering the same current as true, and with intent to pass the same; he the said C. D. then and there well knowing the aforesaid bill and note to be false, forged, and counterfeit; against the peace of said State, and contrary to the form of the statute in such case made and provided.

7. *For passing counterfeit bills or forged notes, under the seventh section.*

That C. D. of said —, heretofore, to wit, on the — day of — now last past, at —, in the county aforesaid, a certain false, forged, and counterfeit bank bill, purporting to be a bank bill payable to the bearer thereof, and to be signed in behalf of the president, directors, and company of the Merchants' Bank, an incorporated banking company in this State, of the tenor following, to wit, &c. did then and there utter and tender in payment as true, with intent him the said A. B. to injure and defraud, he the said C. D., then and there well knowing the aforesaid bill to be false, forged, and counterfeit; against the peace of said State, and contrary to the form of the statute in such case made and provided.

8. *For making a tool to be used in counterfeiting bills, under the ninth section.*

That C. D. of, &c. heretofore, to wit, on, &c. at P— aforesaid, did engrave, make, and provide a certain plate, the same being an instrument, implement, and material adapted and designed for the forging and making of false and counterfeit bills and notes in the similitude of the bills and notes payable to the bearers thereof, which have been issued by and for the Casco Bank, the same being a banking company established in this State, to wit, at, &c. against the peace of said State and contrary to the form of the statute in such case made and provided.

9. *For being possessed of such a tool, under the ninth section.*

That C. D. of, &c. heretofore, to wit, on, &c. at P—, in the county aforesaid, had in his possession a certain plate, block and implement, engraven, adapted, and designed for the stamping, forging, and making of false and counterfeit bills and notes, in the similitude of the bills and notes payable to the bearer thereof, which have been issued by and for the Casco Bank, the same being a bank and banking company which is by law established in this State, to wit, at, &c. with the intent to use the same, and to cause and permit the same to be used in forging and making such false and counterfeit bills and notes of the said Casco Bank; against the peace of said State, and contrary to the form of the statute in such case made and provided.

10. *For fraudulently connecting different parts of several bank notes so as to produce one additional note, under the thirteenth section.*

That C. D. of, &c. heretofore, to wit, on, &c. at, &c. then being possessed of seven several bank notes, each payable to the bearer thereof, and signed in behalf of the president, directors, and company of the Manufacturers and Traders' Bank, the same being an incorporated banking company within this State, to wit, at, &c. then fraudulently connected together different parts of the said several notes in such a manner as to produce one additional bank note, purporting to be payable to the bearer thereof, and to be signed in behalf of the said president, directors and company, and of the tenor following [insert the made bill verbatim,] with intent to pass all the said notes, to wit, eight, as genuine; against the peace of the State, and contrary to the form of the statute in such case made and provided.

11. *For affixing a fictitious signature to a Bank Bill, under the fifteenth section.*

That C. D. of, &c. heretofore, to wit, on, &c. at, &c. did fraudulently, a certain fictitious and pretended signature, to wit, "J. S.,

cashier," affix to a certain false, forged, and counterfeit bank bill, purporting, &c. [as in the previous forms,] with intent to pass the same as true, and injure and defraud, the said J. S. not then being, and never having been an officer or agent, or cashier of said bank; against the peace of said State, and contrary to the form, &c.

12. *For counterfeiting any gold or silver coin, under the sixteenth section.*

That C. D. of, &c. heretofore, to wit, on the — day of — now last past, at P—, aforesaid, in the county aforesaid, did counterfeit, and did procure to be counterfeited, a certain piece of silver coin, current within this State by the laws and usages thereof, called a dollar; against the peace, &c. and contrary to the form, &c.

13. *For having ten counterfeit pieces, with intent to pass the same under the sixteenth section.*

That C. D. of, &c. heretofore, to wit, on, &c. at — aforesaid, had in his possession at the same time, ten pieces of false money and coin, counterfeited in the similitude of the good and legal silver coin current within this State, by the laws and usages thereof, called dollars; with intent to utter and pass the same as true, knowing the same to be false, and counterfeit; against the peace, &c. and contrary to the form, &c.

14. *For having less than ten pieces of counterfeit coin with intent, &c., under the seventeenth section.*

That C. D. of, &c. heretofore, to wit, on, &c. at — aforesaid, had in his possession five pieces of false money and coin, forged and counterfeited in the similitude of the silver money and coin, current within this State by the laws and usages thereof, called dollars; with intent to utter and pass the same as true, he the said C. D., then and there, well knowing the same to be false and counterfeit; against the peace of said State, and contrary to the form of the statute in such case made and provided.

15. *For uttering counterfeit coin, under the seventeenth section.*

That C. D. of, &c. heretofore, to wit, on, &c. at — aforesaid, a certain piece of false money and coin, forged and counterfeited in the similitude of the good and legal silver coin, current within this State by the laws and usages thereof, called a dollar, did utter, pass, and tender in payment as true, with intent him the said A. B. then and there to injure and defraud, he the said C. D. then and there well

knowing the aforesaid piece of coin to be false, and counterfeit ; against the peace of said State, and contrary to the form of the statute in such case made and provided.

16. *For making or having tools for coining, with intent, &c. under the nineteenth section.*

That C. D. of, &c. heretofore, to wit, on, &c. at — aforesaid, intending the good citizens of this State to deceive, injure, and defraud, did cast, stamp, engrave, make and mend, and did then and there knowingly have in his possession a certain tool and instrument, adapted, and designed, for the coining and making of counterfeit coin, in the similitude of the silver money and coin, current within this State by the laws and usages thereof, called a die ; with the intent to use and employ the same, in coining and making the false and counterfeit coin as aforesaid ; against the peace of said State, and contrary to the form of the statute in such case made and provided. Wherefore, &c.

XIII. HOUSES OF ILL FAME, LASCIVIOUSNESS, OBSCENE PRINTS, AND LIKE OFFENCES.

1. *Complaint for keeping a house of ill fame.*

That C. D. of, &c. heretofore, to wit, on, &c. and on divers other days and times, between that day and the day of presenting this complaint, at P— aforesaid, did keep and maintain, and doth yet keep and maintain a house of ill fame, resorted to for the purpose of prostitution and lewdness, against the peace, &c.

2. *For lewd and lascivious cohabitation.*

That C. D. of, &c. heretofore, to wit, on, &c. and on divers days and times, &c. at P—, aforesaid, did lewdly and lasciviously associate and cohabit with one E. F. of, &c., they, the said C. D. and E. F. not being married to each other ; against the peace, &c.

3. *For open and gross lewdness and lascivious behaviour.*

That C. D. of, &c. heretofore, to wit, on, &c. and on divers days and times, &c. at P—, aforesaid, was guilty of open and gross lewdness and lascivious behavior, by openly, grossly, lewdly and lasciviously lying on a bed with one E. F., of, &c. for the space of — hours ; against the peace, &c.

4. *For fornication with a single woman.*

That C. D. of &c. heretofore, to wit, on, &c. at P— aforesaid, with one E. F. of P— aforesaid, a single woman, did commit the crime of

fornication ; against the peace, &c. and contrary to the form of the statute in such case made and provided.

5. *For selling obscene prints, or books.*

That C. D. of, &c. heretofore, to wit, on, &c. at — aforesaid, had in his possession, a ~~certain~~ obscene print, picture and figure, representing [describe the print in general language] which said print manifestly tended to the corruption of the morals of youth ; and the said C. D. the said print then and there offered for sale, and did sell and distribute to one E. F. of, &c. against good morals ; against the peace, &c.

6. *For the crime of incest, the parties being neither of them married.*

That C. D. of, &c. heretofore, to wit, on, &c. at — aforesaid, did commit fornication with one A. D. of the same —, single woman, the said C. D. and A. D. being within the degrees of consanguinity, within which marriages are prohibited and declared by law to be incestuous and void, to wit, the said C. D. being the brother of the said A. D., and both children of B. D., late of — aforesaid, and E. D. his wife ; against good morals and good manners ; against the peace, &c.

7. *For sodomy committed with a boy.*

That C. D. of, &c., heretofore, to wit, on, &c., at — aforesaid, in and upon one E. F., a male child about the age of fifteen, in the peace of said State then and there being, feloniously did make an assault, and then and there feloniously did commit the abominable and detestable crime against nature, by having a venereal affair with the said E. F., and by then and there having carnal knowledge of the body of him the said E. F., against the order of nature ; against the peace, &c.

XIV. KIDNAPPING.

1. *For taking and inveigling a minor child with intent to cause him to be sent out of the State.*

That C. D. of, &c., heretofore to wit, on the day of, &c., now last past at — aforesaid, unlawfully, fraudulently and wickedly, and without any lawful warrant or authority whatever, did take, obtain and inveigle into his custody and possession one E. F. of said —, a minor child under the age of twenty-one years, and son of G. F. of said —, a free citizen of said State, with intent to transport and send, and to cause to be transported and sent, the body and person of

him the said E. F. from and out of said State, without the consent and against the will of the said E. F. and of his father the said G. F., against the peace of the said State, &c.

2. *For kidnapping a minor child with intent to cause him to be sent out of the State and sold as a slave.*

That C. D. of, &c. heretofore, to wit, on the day of — now last past, at — aforesaid, unlawfully, fraudulently and wickedly, and without any lawful warrant or authority whatever, did seize, take, steal and kidnap one E. F. of said —, the minor child of one G. F. of said —, a free citizen of said State, with intent the said E. F. to send and transport, and to cause and procure the said E. F. to be sent and transported from and out of said State, without the consent of the said E. F. and against his will, and against the will and without the consent of the said G. F., the said father of the said E. F., and with intent, also, against the will of the said E. F. and of his said father, the said G. F., to sell and transfer the said E. F. as a slave; against the peace of said State, &c.

XV. MAYHEM.

For cutting off the ear of a person with a knife.

That C. D. of, &c., heretofore, to wit, on, &c., with force and arms at —, aforesaid, in and upon the said A. B., in the peace of said State then and there being, with malicious intent to maim and disfigure the said A. B., did make assault, and that the said C. D., with a certain Spanish knife of the value of fifty cents, which he the said C. D. in his right hand then and there had and held, the left ear of him the said A. B. did then and there cut and tear off, with set purpose and aforethought malice, and with malicious intention the said A. B. by so doing in manner as aforesaid, to maim and disfigure; against the peace, &c. and contrary to the form, &c.

XVI. MURDER, DUELLING AND POISONING, UNDER THE PROVISIONS OF REVISED STATUTES, CHAPTER 154.

1. *For murder by shooting with a pistol, by which the party immediately died, under the first section.*

That C. D. of, &c. heretofore, to wit, on, &c. with force and arms, at — aforesaid, in and upon one E. F., in the peace of the said State then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault;* and that the said C. D. a certain pistol, of the value of two dollars, then and there charged with gun-powder and one leaden bullet, which said pistol he the said C. D. in

his right hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought, did discharge and shoot off, to, against and upon the said E. F., and that the said C. D. with the leaden bullet aforesaid, out of the pistol aforesaid, then and there by the force of the gunpowder aforesaid, by the said C. D. discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound the said E. F., in and upon the right side of the belly of him the said E. F., near the right hip of him the said E. F., giving to him the said E. F. then and there with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid, by the said E. F. in and upon the right side of the belly of him the said E. F., near the said right hip of him the said E. F., one mortal wound, of the depth of four inches, and of the breadth of half an inch;† of which said mortal wound, he the said E. F. then and there instantly died. And so the said A. B. upon his oath aforesaid complains and says, that the said C. D., him the said E. F., in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, against the peace of said State, and contrary to the form of the statute in such case made and provided.

2. *The like offence where the party did not die immediately, under the same section.*

[As before to †] of which said mortal wound the said A. B. on and from the said, &c. until, &c. at — aforesaid, did languish, and languishing did live, on which said, &c. about the hour of nine o'clock in the morning, he the said A. B., at — aforesaid, of the mortal wound aforesaid, died. And so, &c. [as before.]

3. *For murder by stabbing with a knife, under the same section.*

[As in No. 1, to *] And that the said C. D., with a certain knife, of the value of twenty cents, which he the said C. D. in his right hand then there had and held, the said E. F. in and upon the left side of the body, and between the ribs of him the said E. F., then and there feloniously, wilfully, and of his malice aforethought, did strike and thrust, giving to the said E. F. then and there with the knife aforesaid, in and upon the aforesaid left side of the body, between the ribs of him the said E. F., one mortal wound, of the breadth of three inches, and of the depth of six inches, of which said mortal wound, he the said E. F. then and there instantly died. And so the said A. B. upon his oath aforesaid complains and says, that the said C. D. him the said E. F. in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder; against the peace of said State, and contrary to the form of the statute in such case made and provided.

4. *For murder by cutting the throat, under the same section.*

[As in No. 1 to *] And that the said C. D., with a certain case-knife, made of steel and iron, of the value of ten cents, which he the said C. D., in his right hand, then and there had and held, the throat of him the said E. F., feloniously, wilfully, and of his malice aforethought, did strike and cut; and that he the said C. D., with the case-knife aforesaid, by the striking and cutting aforesaid, did then and there give to him the said E. F., in and upon the said throat of him the said E. F., one mortal wound, of the length of three inches, and of the depth of two inches; of which said mortal wound, he the said E. F. from the said — day of — to the — day of — aforesaid, at — aforesaid, did languish, and languishing did live; on which said — day of — aforesaid, in the year aforesaid, at — aforesaid, in the county aforesaid, he the said E. F. of the said mortal wound died. And so the said A. B., upon his oath aforesaid complains and says, that the said C. D. him the said E. F. in manner and form aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did kill and murder; against the peace of said State, and contrary to the form of the statute in such case made and provided.

5. *For murder by a man striking his wife with a poker, under the same section.*

[As in No. 1 to *] And that the said C. D. with a certain iron poker of the value of one shilling, which he, the said C. D., then and there had and held in both his hands, her the said M. D. in and upon the left side of the head, near the left temple of her the said M. D., then and there feloniously, wilfully, and of his malice aforethought, did hit and strike, and that the said C. D. did then and there give unto her the said M. D. by such striking of her with the poker aforesaid, one mortal wound, of the length of two inches, and of the depth of one inch, in and upon the said left side of the head, near the temple of her the said M. D., of which said mortal wound she, the said M. D. then and there instantly died. And so, &c. [As before.]

6. *For murder by beating with the hands about the head and temples, under the same section.*

[As in No. 1 to *] And that the said C. D., with both his hands, him the said A. B. did then and there in and upon the head and left temple of him the said A. B. feloniously, wilfully, and of his malice aforethought, strike and beat; and that the said C. D. by the striking and beating aforesaid, did then and there feloniously, wilfully, and of his malice aforethought, give unto him the said A. B. one mortal bruise in and upon the said left temple of him the said A. B. of the length of

two inches, and of the breadth of two inches, of which said mortal bruise he the said A. B. then and there instantly died. And so, &c. [As before.]

7. *For murder by choking and strangling, under the same section.*

[As in No. 1 to *] And that the said C. D., with both his hands, about the neck and throat of her the said E. F. then and there feloniously, wilfully, and of his malice aforethought, did fix and fasten; and that he the said C. D. with both his hands so as aforesaid fixed and fastened about the neck and throat of her the said E. F., her the said E. F. then and there feloniously, wilfully, and of his malice aforethought, did choke and strangle; of which said choking and strangling, she the said E. F. then and there instantly died, &c. [As before.]

8. *For murder by strangling with a handkerchief, under the same section.*

[As in No. 1 to *] And that the said C. D. with a handkerchief, of the value of twenty cents, about the neck of him the said E. F. then and there feloniously, wilfully, and of his malice aforethought, did put, fasten, and bind; and that the said C. D., with the said handkerchief about the neck of him the said E. F. then as aforesaid put, fastened, and bound, him the said E. F., then and there, feloniously, wilfully, and of his malice aforethought, did choke and strangle; of which choking and strangling, the said E. F. then and there instantly died, &c. [As before.]

9. *For the murder of a bastard child by strangling, under the same section.*

That C. D., of, &c., single woman, on the — day of — now last past, being pregnant with a male child, the same day and year at — aforesaid, by the providence of God did bring forth the said child alive, of the body of her the said C. D. alone and in secret, which said male child, so being born alive, was, by the laws of this State, a bastard; and that the said C. D., afterwards, to wit, on the same — day of — in the year aforesaid, with force and arms, at — aforesaid, in the county aforesaid, in and upon the said male child, in the peace of the said State then and there being, feloniously, wilfully, and of her malice aforethought, did make an assault; and that she the said C. D., with both her hands about the neck of him the said child then and there fixed, him the said child then and there feloniously, wilfully, and of her malice aforethought, did choke and strangle; of which said choking and strangling, the said child then and there instantly died. And so the said A. B., upon his oath aforesaid, complains and says, that

the said C. D., the aforesaid male child, in manner and form aforesaid, feloniously, wilfully, and of her malice aforethought, did kill and murder; against the peace of the State, and contrary to the form of the statute in such case made and provided.

10. *For murder in a duel out of this State, under the sixth section.*

That C. D. of — aforesaid, being an inhabitant and resident of this State, heretofore, to wit, on, &c., at —, in the State of R. I., by a previous appointment and engagement made within this State, to wit, at — aforesaid, on the — day — now last past, with one E. F., of, &c. to fight a duel without the jurisdiction of this State, to wit, at S—, aforesaid, did then and there, to wit, on the — day aforesaid, at S— aforesaid, fight a duel with the said E. F., and did then and there, to wit, on, &c., at, &c., upon the said E. F. feloniously, wilfully, and of his malice aforethought, make an assault. [Continue as in No. 1 to †, then as in No. 2, setting forth that E. F. died of the wound within this State.]

11. *For challenging a person to fight a duel, under the ninth section.*

That C. D. of, &c. intending and designing one E. F., in the peace of the said State then and there being, wilfully, maliciously, and of his malice aforethought, to kill and murder, heretofore, to wit, on, &c., with force and arms at — aforesaid, did unlawfully and maliciously send and deliver to the said E. F. a [written] message, purporting and intended to be a challenge to him the said E. F. to fight a duel with him the said C. D., with dangerous weapons, to wit, with pistols; to the great damage and terror of him the said E. F., against the peace of said State, and contrary to the form of the statute in such case made and provided.

12. *For carrying a challenge, under the ninth section.*

That C. D. of, &c. heretofore, to wit, on, &c. at — aforesaid, did unlawfully and maliciously, carry and deliver from one A. B. of, &c. to one C. D. of, &c. a [written] message purporting and intended to be a challenge from the said A. B. to the said E. F. to engage in and fight a duel, he the said C. D. well knowing the said message to be a challenge as aforesaid; against the peace, &c. and contrary to the form, &c.

13. *For accepting a challenge to fight a duel, under the tenth section.*

That C. D. of, &c. heretofore, to wit, on the — day of — now last past, with force and arms, at — aforesaid, in the county afore-

said, did accept a challenge to fight a duel with one E. F., and did then and there consent to fight therein with him the said E. F., with dangerous weapons, to wit, with pistols, loaded with gunpowder and leaden bullets, to the hazard of the lives of them the said C. D. and E. F., which challenge the said C. D. had before that time sent, given, and delivered, and caused and procured to be sent, given and delivered to the said E. F. to fight said duel, by a message for that purpose ; against the peace of said State, and contrary to the form of the statute in such case made and provided.

14. *For posting a person for not fighting a duel, under the twelfth section.*

That heretofore, to wit, on, &c. at — aforesaid, one C. D. by a message in writing, carried and delivered to the said A. B., challenged the said A. B. to fight a duel with him the said C. D., which said duel the said A. B. did not fight; and the said C. D. afterwards, to wit, on the — day of, &c. at — aforesaid, on the town house in said —, unlawfully, wickedly and maliciously posted the said A. B. for not so fighting the said C. D., and then and there, in a certain hand bill, by him the said C. D. then posted on the said town hall, used, to and concerning him the said A. B., the following reproachful and contemptuous language, to wit, [set forth the words verbatim, if possible,] against the peace, &c. and contrary to the form, &c.

15. *For poisoning a well of water, under the thirty-second section.*

That C. D. of, &c. heretofore, to wit, on, &c. at, &c. of his malice aforethought, contriving and intending to kill and murder one A. B. and his wife and children and family, with him in said — residing, a great quantity, to wit, one pound of yellow arsenic, being a deadly poison, into the common well belonging to the house in — aforesaid, where the said A. B. resides, did cast and throw, and did mingle the said arsenic with the water of the said well ; against the peace of said State, and contrary to the form of the statute in such case made and provided.

XVII. PERJURY AND SUBORDINATION OF PERJURY.

1. *For perjury of a witness on the trial of an issue in the Supreme Judicial Court.*

That heretofore to wit, at the supreme judicial court, begun and holden at P—, within and for the county of C—, on the second Tuesday of November, in the year of our Lord one thousand eight hundred and fifty, in the said court, amongst the pleas of the said term, a

certain issue was duly joined in the said court, between C. D., the plaintiff, and E. F. the defendant, in a certain action of trespass for assault and battery and false imprisonment, which action before that time had been commenced between the parties in that behalf, and was then pending in the supreme judicial court aforesaid; and that, afterwards, to wit, at the sitting of said court, before J. H., a justice thereof, the same issue came on to be tried, and then and there was tried, in due form of law, by a jury of the said county of C—, in that behalf duly impanelled and sworn between the said parties; and that, upon the trial of the said issue, one G. H. late of — in the county of —, laborer, did then and there, to wit, on the — day of — in the year aforesaid, at P— aforesaid, appear, and was produced as a witness for and on behalf of said C. D. the plaintiff, and that the said G. H. did then and there before the said court, take his corporal oath, and was then and there duly sworn by the said court, that the evidence which he should give to the said court and jury, touching the matters in question on the said issue, should be the truth, the whole truth, and nothing but the truth; the justices of the said court having then and there sufficient and competent power and authority to administer the said oath to the said G. H. in that behalf; and then and there, upon the trial of said issue, it became a material question, whether the said E. F. had struck the said C. D., or had dragged him by the hair of his head; and that thereupon the said G. H. being so produced and sworn as aforesaid, and being then and there lawfully required to depose the truth in a proceeding in a court of justice, devising and wickedly intending to cause a verdict to pass against the said E. F., and for the said C. D. on the trial of said issue, did then and there, before the said supreme judicial court, falsely, maliciously, wilfully, and corruptly, and by his own proper act and consent, depose, swear, and give evidence, amongst other things, to the jurors of the said jury, so sworn between the parties aforesaid, in substance as follows: that the said E. F., the said defendant, dragged the plaintiff, the said C. D., by the hair of his head, on the ground, from his own door as far as Wilkinson, the butcher's; whereas in truth and in fact, the said E. F. did not drag the said C. D. by the hair of his head, from his own door as far as Wilkinson, the butcher's; and whereas, in truth and in fact, the said E. F. did not drag the said C. D. by the hair of his head at all. And so the said A. B., upon his oath aforesaid, doth say, that the said G. H. in manner and form aforesaid, and of his own most corrupt mind, did falsely, wickedly, wilfully, and corruptly commit wilful and corrupt perjury, to the great displeasure of Almighty God, to the manifest perversion of public justice; against the peace of said State, and contrary to the form of the statute in such case made and provided.

2. *For subornation of perjury, by procuring a woman to swear a bastard child on an innocent man.*

That one C. D. of —, &c. a single woman, on the — day of — now last past, at —, aforesaid, was pregnant with child, which if born alive would be a bastard, and that on the said — day of — aforesaid, at — aforesaid, E. F. of —, in the county of —, yeoman, being a person of an evil mind and disposition, and wickedly and maliciously contriving and intending to deprive one G. H. not only of his good name, fame, and reputation, and to put him to great trouble and expense, but also to cause the said G. H. to be falsely charged with begetting the said C. D. with child, and with being the father of said child with which the said C. D. was then and there pregnant as aforesaid, did falsely, wickedly, knowingly, wilfully, and corruptly solicit, suborn, and procure the said C. D. to go before I. J. Esq. then and still one of the justices of the peace in and for the said county of —, duly and legally empowered and qualified to discharge and perform the duties of said office, and make oath that the said G. H. was the father of the said child, with which she was then pregnant; and that in consequence, and by the means, encouragement, and effects of the said wicked and corrupt subornation and procurement of the said E. F., she the said C. D. afterwards, to wit, on the same — day of —, in the year aforesaid, at said —, in the county aforesaid, did go in her proper person before the said I. J., Esq. being such justice as aforesaid, and having then and there sufficient and competent power and authority to administer an oath and take the examination of the said C. D. hereinafter mentioned; and then and there in her complaint, made oath, accusing the said G. H. of being the father of said child, and then and there desired the said I. J. to institute a prosecution against the said G. H. therefor; and the said C. D. was then and there sworn before the said I. J. Esq.; and the said C. D. being so sworn as aforesaid, and being then and there lawfully required to depose the truth in a proceeding in a court of justice, by the means and in consequence of the said wicked solicitation, subornation, and procurement of the said E. F. did then and there, upon her oath aforesaid, before the said I. J., being such justice as aforesaid, falsely, wickedly, wilfully, and corruptly say, depose, and swear, and give in her accusation and examination, in writing, and under oath, as follows, [here copy and insert the examination verbatim, with proper inuendoes;] whereas, in truth and in fact, the said E. F., at the time of soliciting, suborning and procuring the said C. D. corruptly and falsely to swear as aforesaid, well knew that the said G. H. was not the father of the said child, with which she was then pregnant as aforesaid. And so the said A. B. upon his oath aforesaid, doth complain and say, that the said E. F. then and there, in manner and form aforesaid, did falsely, knowingly, wilfully, and corruptly commit subornation of perjury, by wilfully, falsely, knowingly, and corruptly suborning, and procuring

the said C. D. to commit wilful and corrupt perjury, in and by her oath aforesaid, in manner and form aforesaid; to the great displeasure of Almighty God, against the peace and dignity of the said State, and contrary to the form of the statute in such case made and provided.

XVIII. POLYGAMY.

1. *Against a man who, having a former wife living, marries another person in this State.*

That C. D. of, &c., heretofore, to wit, on the — day — now last past, at —, in the county of —, and within the said State, did marry one E. F. of — aforesaid, spinster, and the said E. F. did then and there take to be his wife, he, the said C. D., then having a former wife living, to wit, G. D. to whom the said C. D. was married on the — day of, &c. at, &c.; against good morals, against the peace, &c., and contrary to the form of the statute in such case made and provided.

2. *Against a man who, having a former wife living, marries another person in another State, and continues to cohabit with her in this.*

That C. D. of, &c. heretofore, to wit, on, &c., at, &c., did marry one E. F., spinster, and the said E. F. then and there had for his wife, and that the said C. D., afterwards, to wit, on, &c., at A—, in the State of New York, did marry and take to wife, one G. H., widow, and to the said G. H. was then and there married, the said E. F., his former wife, being then and there living, and in full life, and he the said C. D. did then and hath ever since and doth now continue to cohabit with the said G. H., within this State, to wit, at P— aforesaid; against the peace of said State, &c.

XIX. SELLING UNWHOLESOME PROVISIONS.

For selling tainted meat.

That C. D. of, &c. heretofore, to wit, on, &c., at — aforesaid, did sell to one E. F. a quantity, to wit, ten pounds of diseased, corrupted, and unwholesome pork, without making the same fully known to the said E. F., he the said C. D. knowing the same to be so diseased, corrupted, and unwholesome; against the peace of said State, and contrary to the form of the statute in such case made and provided.

XX. RAPE AND ABUSE OF A FEMALE CHILD.

1. *Form of a complaint for rape.*

That C. D. of, &c., heretofore, to wit, on, &c., with force and arms at — aforesaid, in and upon one E. F., in the peace of the said

State then and there being, violently and feloniously did make an assault, and her the said E. F. being of the age of ten years or more, then and there feloniously did ravish, and carnally know, by force and against her will; against the peace of said State, and contrary to the form of the statute in such case made and provided.

2. *For carnally knowing and abusing a female child under the age of ten years.*

That C. D. of, &c. heretofore, to wit, on, &c. at —, &c. in and upon one E. F., a woman child under the age of ten years, to wit, of the age of nine years, in the peace of the said State then and there being, feloniously did make an assault, and her the said E. F. then and there, unlawfully, feloniously and carnally did know, and abuse; against the peace of said State, and contrary to the form of the statute in such case made and provided. Wherefore, &c.

XXI. RIOTS, AND UNLAWFUL ASSEMBLIES.

1. *For a riot by twelve or more persons, armed with dangerous weapons, and an assault.*

That C. D., E. F., and G. H., all of —, &c. laborers, together with divers others, evil disposed persons, to the number of twelve or more, whose names to him the said A. B. are as yet unknown, all being armed with clubs or other dangerous weapons, heretofore, to wit, on the — day of —, &c. with force and arms, at — aforesaid, in the county aforesaid, did unlawfully, riotously, and tumultuously assemble and gather together, to disturb the peace of the said State; and being then and there so assembled and gathered together, in and upon one I. J. in the peace of the said State then and there being, unlawfully, riotously, and tumultuously did make an assault, and him the said I. J. did then and there unlawfully, riotously, and tumultuously beat, wound, and ill-treat, so that his life was thereby greatly endangered; and other wrongs then and there unlawfully, riotously, and tumultuously did and committed; to the great damage of him the said I. J., to the great terror of the people, and against the peace and dignity of the State aforesaid, &c.

2. *For a riot and destroying a dwelling house.*

That C. D., E. F., and G. H., together with other evil disposed and riotous persons, to the number of twelve or more, to the said A. B. unknown, all being armed with clubs or other dangerous weapons, heretofore, to wit, on, &c. at —, with force and arms, did unlawfully, riotously, and tumultuously assemble and gather together to disturb the peace of said State; and being so assembled and gathered

together, a certain building and dwelling house, in the possession and lawful occupation of him the said A. B., then and there unlawfully, riotously, and tumultuously, did demolish, pull down, and destroy, and other wrongs then and there did; to the great disturbance and terror of the people there residing, to the great damage of him the said A. B., and against the peace and dignity of the State, &c.

3. *For riotously attacking a dwelling house, breaking windows, &c.*

That C. D., E. F., G. H., together with divers others, to the number of twenty, to the said A. B. unknown, being evil disposed and riotous persons, and disturbers of the peace of said State, heretofore, to wit, on —, &c. with force and arms, to wit, with clubs, staves, stones, and other dangerous and offensive weapons, at — aforesaid, in the county aforesaid, the dwelling-house of her, the said A. B., there situate, in the night time, unlawfully, riotously, and tumultuously did attack and beset, and did then and there unlawfully, riotously, tumultuously, and outrageously* make a great noise, disturbance, and affray, near to, and about the dwelling-house of her the said A. B. there situate, and did unlawfully, riotously, and tumultuously continue near to about the said dwelling-house, making such noise, disturbance, and affray, for the space of two hours, and the windows of the said dwelling-house did then and there unlawfully, riotously, and tumultuously, with the dangerous and offensive weapons aforesaid, break, destroy, and demolish; to the great damage, terror, and dismay of her the said A. B. and of her family, in the dwelling-house aforesaid, then and there lawfully being, to the great terror of the people of said State, and against the peace and dignity of the State aforesaid.

4. *For riotously beginning to destroy a dwelling-house.*

[As in No. 3 to *] Begin to demolish, pull down and destroy, and other wrongs then and there did; to the great disturbance, &c. against the peace, &c. and contrary to the form of the statute in such case made and provided.

XXII. ROBBERY.

1. *Complaint for a robbery committed by an armed man.*

That C. D. of &c. heretofore, to wit, on, &c. with force and arms, at — aforesaid, in a certain public and common highway, there, in and upon one E. F., in the peace of said State then and there being, feloniously did make an assault, being armed with a dangerous weapon, and with the intent, if resisted, to kill or maim the said E. F., to wit, a certain gun called a pistol, loaded with gunpowder and a certain

leadon bullet, which gun he the said C. D. in his right hand then and there had and held, and him the said E. F., in bodily fear and danger of his life, in the highway aforesaid, then and there feloniously did put, and one gold watch of the value of fifty dollars of the goods and chattels of him the said E. F., from the person and against the will of the said E. F., in the highway aforesaid then and there feloniously did rob, steal, take and carry away; against the peace of said State, and contrary to the form of the statute in such case made and provided.

2. *Complaint for a robbery by one not being armed.*

That C. D. of, &c. heretofore, to wit, on, &c. with force and arms, at — aforesaid, in the dwelling-house of one E. F., there situate, in and upon A. B., in the peace of the said State then and there being, feloniously did make an assault, and her the said A. B. in bodily fear, in the said dwelling-house then and there feloniously did put, and three pieces of gold coin, of the proper coin of the United States called half eagles, of the value of fifteen dollars, of the goods and chattels and moneys of the said A. B., from the person and against the will of the said A. B., in the dwelling-house aforesaid, then and there by force and violence did feloniously rob, steal, take and carry away; against the peace of the State, and contrary to the form of the statute in such case made and provided.

XXIII. SEPULTURE.

1. *For digging up and removing a body without authority.*

That C. D. of, &c. heretofore, to wit, on the — day of —, &c. with force and arms, at — aforesaid, in the county aforesaid, the common burying ground belonging to the first parish in the said town of —, there situate, unlawfully, knowingly, and wilfully did break and enter, and the grave there, in which a certain human body, to wit, the body of one E. F., had lately before been interred and there was, unlawfully, knowingly and wilfully did open, and the said body of her the said E. F. and the remains thereof, then and there in the grave aforesaid being, unlawfully, knowingly, and wilfully did dig up, disinter, remove, and convey away from and out of the grave aforesaid, for the purpose of dissection; he the said C. D. then and there not being authorized so to do, either by the board of health, overseers of the poor, directors of any work-house, or the selectmen of the said town of —, in which the said grave and the burying ground aforesaid was and is situate; against the peace, &c. and contrary to the form of the statute in such case made and provided.

2. *For defacing a tomb stone.*

That C. D. of, &c. heretofore, to wit, on, &c. at — aforesaid, did wilfully, maliciously and wickedly, mutilate, deface and injure a certain marble tomb stone placed in the rural cemetery there, and designed as a memorial to A. B. deceased; against the peace of said State, and contrary to the form of the statute in such case made and provided.

XXIV. THEATRICAL EXHIBITIONS.

1. *Against one for setting up a circus without license.*

That C. D. of, &c. heretofore, to wit, on, &c. at — aforesaid, did set up and promote a certain public show and exhibition, to wit, a circus, to which admission was then and there obtained on payment of money, he, the said C. D. not having first obtained a license therefor, according to law; against the peace of said State, and contrary to the form of the statute in such case made and provided.

2. *Against one for the like, contrary to the terms and conditions of a license obtained.*

That C. D. of, &c. heretofore, to wit, on, &c. at — aforesaid, was duly licensed by the selectmen of the said town of —, to set up and promote a certain public show and exhibition called a circus, at the said town of —, upon the terms and condition that the said show and exhibition should not be kept open and continue later than the hour of nine o'clock in the afternoon of any day during the time said license should continue in force: yet the said C. D. afterwards, to wit, on, &c. and while the said license was in force, did set up and promote the said public show and exhibition, and the same did then and there keep open at a later hour than nine o'clock in the afternoon, to wit, till the hour of eleven o'clock in the afternoon, contrary to the terms and conditions of such license; against the peace of said State, and contrary to the form of the statute in such case made and provided.

XXV. TREASON, AND MISPRISION OF TREASON.

1. *Complaint for treason, by levying war against the State of Maine.*

A. B. of —, &c. upon his oath complains, that J. F., late of —, in the county of —, yeoman, being an inhabitant of, and residing within the State, to wit, in the town and county aforesaid, and under the protection of the laws of this State, and owing allegiance and fidelity to the said State, not weighing the duty of said allegiance and fidelity, but wickedly devising and intending the peace of the said State to disturb, on the seventh day of March, in the year of our Lord

one thousand eight hundred and fifty, at —, in the county aforesaid, unlawfully, maliciously, and traitorously did compass, imagine, and intend to raise and levy war, insurrection, and rebellion, against the said State, and to fulfil and bring to effect the said traitorous compassings, imaginations, and intentions of him the said J. F., he the said J. F. afterwards, that is to say, on the said seventh day of March, in the year of our Lord one thousand eight hundred and fifty, at the said town and county of —, with a great multitude of persons, whose names are unknown to him the said A. B., to a great number, to wit, to the number of one hundred persons and upwards, armed and arrayed in a warlike manner, that is to say, with guns, swords, clubs, staves, and other warlike weapons, as well offensive as defensive, being then and there unlawfully, maliciously, and traitorously assembled and gathered together, did falsely and traitorously assemble and join themselves together against the said State; and then and there, with force and arms, did falsely and traitorously, and in a warlike and hostile manner array and dispose themselves against the said State; and then and there, with force and arms, in pursuance of such their traitorous intentions and purposes aforesaid, he the said J. F. with the said other persons, so as aforesaid traitorously assembled and armed, and arrayed in manner aforesaid, most wickedly, maliciously, and traitorously did ordain, prepare, and levy war against the said State;* contrary to the duty of the allegiance of him the said J. F.; against the peace of the said State, and contrary to the form of the statute of the said State in such case made and provided.

2. *Misprision of treason, by concealing knowledge of the commission of the crime of treason.*

[As before to *] And the said A. B. further shows that then and there, to wit, on the said seventh day of March, and long before that time, at the said town and county of —, one C. D. of, &c. had knowledge of the commission of the said crime of treason against this State, and did not then, nor hath since disclosed and made known such treason of the said J. F. against the said State to the governor of said State, nor to any judge of a court of record, nor to any justice of the peace, but did then and hath ever since concealed the same; contrary to the duty of the allegiance of him the said C. D.; against the peace of the said State, and contrary to the form of the statute in such case made and provided.

APPENDIX.

WE have deemed it useful to append to this volume a few forms, such as justices of the peace may occasionally find it convenient to refer to.

I. ASSIGNMENTS.

1. *General form for an assignment not under seal.*

For value received, I hereby assign the within, &c.
to C. D.

A. B.

2. *General form for an assignment under seal.*

Know all men by these presents, that I, the within named A. B., in consideration of one dollar to me paid by C. D. the receipt of which is acknowledged, do hereby assign to said C. D. the within written instrument, and all my interest in the covenants and agreements therein contained, hereby authorizing the said C. D. in my name, but to his own use, to do every thing necessary to his complete enjoyment of the premises. In witness, &c.

3. *Assignment of a mortgage, upon the back of the mortgage.*

Know all men by these presents, that I, A. B., the within named mortgagee, in consideration of five hundred dollars to me paid by C. D., the receipt of which is acknowledged, do hereby give, grant, sell, assign, and convey to the said C. D., his heirs and assigns, the within mortgage deed, the debt thereby secured, and all my right, title and interest in the premises therein described, under and by virtue of the same. To have and to hold the same to said C. D., his heirs and assigns, to his and their use.*

In witness whereof, I have hereunto set my hand and seal, &c.

Signed, sealed, &c.

A. B. [L. S.]

This should be acknowledged. Sometimes if it well to insert after the * the following covenant:

"And I do covenant with said C. D., his heirs and assigns, that there is now due and unpaid on said mortgage debt the sum of five hundred dollars, and that I have good right to make this conveyance."

4. *Assignment of a patent right, within one State.*

Know all men by these presents, that I, A. B., in consideration of five dollars, to me paid by C. D., the receipt of which is acknowledged, do hereby grant, sell, assign, transfer and convey to said C. D. the exclusive right, under letters patent dated Jan. 1st, 1847, of making, using, and vending to others to be made, used and sold, [here insert the title of the patented improvement or invention] within the State of Maine, and not elsewhere. To have and to hold the same to said C. D., his executors, administrators and assigns, for and during the continuance of said patent. And I do covenant with said C. D., that I have good right to make this conveyance. In witness, &c.

Signed, sealed, &c.

A. B. [L. s.]

To be acknowledged.

II. *BILLS OF SALE.*

1. *A bill of sale under seal.*

Know all men by these presents, that I, A. B. in consideration of one dollar to me paid by C. D., the receipt of which is acknowledged, do hereby grant, sell, assign and convey to said C. D. the following personal property, to wit, &c. To have and to hold to said C. D., his executors, administrators and assigns forever. In witness, &c.

Signed, &c.

A. B. [L. s.]

2. *A bill of sale by two merchants, partners, to a third, of their whole interest in a store.*

[Insert in the above form the following description,] "All the stock in trade, goods, wares, merchandize, book-accounts, notes, bills, drafts, choses-in-action, and other property of said firm."

III. *BONDS.*

1. *Common form for a bond.*

Know all men by these presents, that I, A. B., am held and firmly bound unto C. D., in the full and just sum of one hundred dollars, to be paid unto the said C. D., his executors, administrators or assigns, [on demand;] for which payment well and truly to be made, I bind myself, my heirs, executors and administrators, firmly by these presents. In witness whereof, I have hereunto set my hand and seal this — day of —, A.D. —. Signed, &c.

A. B. [L. s.]

A bond is the method usually selected for binding parties to the future performance of a present agreement, and is, as often as otherwise, the most convenient mode of so doing. When the obligor signs a bond for this purpose, a condition is attached. Without the condition, the above is only an obligation for the payment of a given sum of money, as is a note of hand a promise to the same effect. The condition of a bond follows immediately after the obligation and before the signature, for the purpose of setting forth some matters upon the happening of which the bond is to be void, and is commonly introduced by the words, "The condition of this obligation is such that."

The condition should commence by reciting every thing necessary to make the matter of avoidance plain and intelligible on the face of the papers, introduced by the word, "Whereas." The matter of avoidance follows, introduced by the words "now, therefore, if the said A. B. shall, &c. then this obligation shall be void; otherwise shall remain in full force and virtue." A form for a bond of indemnity is given, as illustrative of these remarks :

2. *Condition of a bond of indemnity for paying a lost note.*

The condition of this obligation is such, that, whereas the said C. D. on the fourteenth day of December last, by his note in writing, by him signed, of that date, for value received, promised the said A. B. to pay him or his order the sum of three hundred dollars in three months from date; and, whereas the said note is alleged to be lost and mislaid, and cannot be found, but the said C. D. hath nevertheless paid the said sum according to the tenor thereof: Now, therefore, if the said A. B. shall save the said C. D., his executors, administrators, and assigns forever harmless, for having so paid said sum of money, and from all liability under and by virtue of said note, and from all loss, cost, trouble, and expense in any way therefrom arising, then this obligation shall be void; otherwise shall remain in full force and virtue.

IV. DEEDS AND MORTGAGES.

1. *Common warrantee deed.*

Know all men by these presents, that I, A. B. of Portland, in the county of Cumberland, and State of Maine, Esq., in consideration of one hundred dollars to me paid by C. D. of Portland aforesaid, trader, the receipt of which is acknowledged, do give, grant, sell and convey to the said C. D. his heirs and assigns, a certain tract of land, &c.
[Description.]

To have and to hold the aforegranted premises to the said C. D., his heirs and assigns, to his and their sole use and behoof forever.

And I do for myself, my heirs, executors and administrators, covenant with the said C. D., his heirs and assigns, that I am lawfully seized in fee of the aforegranted premises: that they are free of all incumbrances; that I have good right to sell and convey the same to said C. D.; and that I will warrant and defend the same premises to said C. D., his heirs and assigns, forever, against the lawful claims and demands of all persons.

In witness whereof, I have hereunto set my hand and seal this — day of — in the year, &c. A. B. [L. S.]

Signed, sealed and delivered
in presence of

2. *Common quit-claim deed.*

Know all men by these presents, that I, A. B. &c. in consideration, &c. do hereby grant, sell, and quit-claim to said C. D., his heirs, &c. all my right, title and interest in and to [here describe the premises.]

To have, &c. And I do covenant with said C. D., his heirs and assigns, to warrant and defend said premises against the lawful claims and demands of all persons claiming by or under me. In witness, &c.

3. *Release of dower.*

Where there is dower, the deed may conclude as follows:

"In witness whereof, we, the said A. B. and Sarah, wife of the said A. B., for the consideration aforesaid, and in token of her relinquishment of all right of dower in the premises, have hereunto set our hands and seals, &c.

4. *Deed of land of husband and wife, in right of wife.*

Know all men by these presents, that we A. B. of, &c. and C. D., wife of said A. B., in her right, in consideration, &c. [as in the other forms, with covenant that both are seized.]

5. *Form of an administrator's deed.*

Know all men by these presents, that I, A. B. of —, in the county of —, in the State of —, administrator of the goods and estate, which were of C. D., late of —, deceased, intestate, having, by an order of the — court, held at —, within and for said county of —, on the — day of —, 18—, obtained license to make sale of so much of the real estate of said deceased, as would produce the sum of — dollars, for the payment of his debts and incidental

charges of sale; [or, the whole of the real estate of said deceased, because a partial sale thereof, would greatly injure the residue;] and in pursuance of said license, gave notice that said real estate would be offered for sale, at public vendue, on the — day of —, [which said sale was adjourned from said day to the present day, if so;] and on this day, at —, the following described real estate [here describe the estate sold] was offered for sale, and was then and there struck off to E. F., of P., in said county, for the sum of — dollars, he being the highest bidder therefor. Now, therefore, know ye, that I, the said A. B., by virtue of the power and authority in me vested as aforesaid, and in consideration of the aforesaid sum of — dollars, to me paid by the said E. F., the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell and convey to said E. F., his heirs and assigns, the above described land, with all the privileges and appurtenances to the same belonging. To have and to hold the same, to him, the said E. F., and his heirs and assigns forever. And I, the said A. B., for myself, and my heirs, executors, and administrators, do hereby covenant with the said E. F., his heirs and assigns, that I am the legal administrator of said estate; and I have conformed to all the requirements of the law, in obtaining license, and making sale as aforesaid, and that I have good right and lawful authority to sell and convey said lands, as aforesaid.

In witness whereof, I, the said A. B., have hereunto set my hand and seal, this — day of —, A. D. 18—.

[The date should be the day of sale.]

Signed, sealed and delivered, }
in presence of —. }

A. B. [L. S.]

Administrators should preserve all the evidence of having advertised and sold the estate.

6. *Deed to a married woman.*

The deed should run to E. B., wife of A. B. of, &c.

The *habendum* to be in the following form :

To have and to hold the afore-granted premises to the said E. B., her heirs and assigns, without the intervention of a trustee, to her and their sole and separate use forever, free from the interference or control of her husband.

7. *Forms for mortgages.*

A form is usually made in the like form with a warranty deed, with a condition of defeasance inserted immediately after the covenants, and before the *in testimonium*, and release of dower, if dower be released. The usual form of this condition is as follows :

3. *Common condition to a mortgage.*

Provided, nevertheless, if the said C. D., his heirs, executors or administrators, shall pay to the said A. B. his heirs, executors, administrators or assigns, the sum of [five hundred dollars on demand, with interest semi-annually,] then this deed as also a certain note bearing even date with these presents, given by the said C. D. to the said A. B. to pay the same sum at the time and with interest as aforesaid, shall both be void; otherwise shall remain in full force and virtue.

If the mortgage is to remain in possession till condition broken, the following may be added: "And it is agreed the mortgagor, his heirs and assigns, may remain in possession till condition be broken." Besides this condition, there are others which are often inserted, as follows:

9. *Condition for insurance, in a mortgage.*

[Before the word "then" insert:] "And shall also pay all sums that said A. B., his heirs, executors or administrators may expend for insuring the buildings on said premises for his or their benefit."

10. *Condition of indemnity for indorsing.*

Shall indemnify and save harmless the said A. B., his executors, administrators or assigns, for the said A. B.'s having this day at his request endorsed a note of five hundred dollars of this date, and for his signing or endorsing all notes that he may hereafter sign or endorse for him, and from all loss, cost, trouble, or expense, from any liability he may hereafter incur or be under as surety, acceptor, or endorser for him, and from any claim against him as such surety, acceptor, or endorser, to an amount not to exceed two thousand dollars at any one time, then this deed, &c.

No note need be given where the condition is in this form.

11. *Condition for general indemnity.*

Shall pay to the said A. B., his executors, &c. all sums that are or may become due to him or them, from the said C. D. on account, note, draft, or otherwise, and shall indemnify and save him and them from any and all acceptances, endorsements or other liabilities made or incurred by him, for or on account of said C. D., and for all overdrafts made by said C. D., or advances made by said A. B., not exceeding at any one time six thousand dollars, and from all loss, cost, trouble or expense in the premises, and repay all such advances; then this deed, &c.

As in the last, so here, no note is necessary.

12. *Form for a mortgage of personal property.*

Know all men by these presents, that I, A. B. of, &c. in consideration of fifty dollars paid to me by C. D. of, &c. the receipt whereof I do hereby acknowledge, do hereby grant, bargain, sell, and convey unto the said C. D. the following personal property, to wit: To have and to hold the property afore-granted, to the said C. D., his executors, administrators, and assigns, forever. And I do, for myself, my executors and administrators, covenant with the said C. D., his executors, administrators, and assigns, that I have good right to sell and convey the said property to the said C. D.; and that I will warrant and defend the same to the said C. D., his executors, administrators, and assigns, forever, against the lawful claims and demands of all persons. Provided, nevertheless, that if the said A. B., his executors or administrators, pay to the said C. D., his executors, administrators, or assigns, the sum of fifty dollars in two months from date, then this deed, as also a certain note bearing even date with these presents, given by the said A. B. to the said C. D., to pay the same sum with interest, and at the time aforesaid, shall both be void; otherwise shall remain in full force and virtue. And it is agreed that the mortgagor, his executors, administrators and assigns, shall remain in possession of said property till condition broken.

In witness whereof, I, the said A. B., have hereunto set my hand and seal this — day of —, in the year of our Lord one thousand eight hundred and fifty —.

A. B. [L. S.]

Signed, sealed and delivered, }
in presence of us. }

V. LEASES.

A lease is usually made by indenture of two parts, executed by both parties, each party retaining one part. The following is the most common form of lease, the covenants it contains being almost always inserted:

This indenture, made this — day of —, in the year of our Lord one thousand eight hundred and fifty —, by and between — of —, in the county of —, and State of Maine, of the one part, and — of —, in the — of — of the other part, witnesseth, that the said — doth hereby lease, demise, and let unto the said — the following described estate, situate, &c. To hold for the term of — years from the —, the said lessee yielding and paying therefor at the rate of —. And the said lessor doth promise that, while the lessee and his representatives pay the rent and perform the covenants herein named, they shall peaceably hold and enjoy said premises. And the said lessee doth promise to pay the said rent at the time aforesaid; and to quit and deliver up the premises to the lessor or

his attorney, peaceably and quietly, at the end of the term, in as good order and condition (reasonable use and wearing thereof, accidents by fire, and other injuries not happening through the fault or neglect of the lessee, excepted) as the same now are, or may be put into by the lesser; and not make or suffer any waste thereof, assign, under-let, or make alterations, without the consent of the lessor; and that the lessor may enter to make improvements, and to expel the lessee if he shall fail to pay the rent as aforesaid, or make or suffer any strip or waste thereof.

In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

| | |
|---------------------------------|---------|
| Signed, sealed and delivered, } | [L. S.] |
| in presence of } | [L. S.] |

If the lessor is to pay the taxes, a covenant to that effect should be inserted among the agreements on his part. If the lessee, the like among his.

The parties oftentimes wish to make a lease which shall renew itself. This may be done by inserting just before the words, "the said lessee yielding, &c." the following words—"and if, at the expiration of the term aforesaid, neither of the parties to this indenture shall have given to the other previous notice of an intention not to renew the said lease, the same shall be considered as renewed for a further term of one year; and the said lease shall in the same manner be renewed from year to year, upon the same terms and conditions; and the covenants therein shall remain in full force, until such notice shall be given by one of said parties, three months previous to the expiration of the year, of his intention not again to renew the lease aforesaid."

VI. LETTER OF ATTORNEY.

1. *General form.*

Know all men by these presents, that I, A. B. do hereby make, constitute and appoint C. D. my true and lawful attorney, for me and in my name to [*the matter of appointment.*] And hereby ratifying whatsoever my said attorney may lawfully do in the premises, I have hereunto set my hand and seal this — day of — A. D.

2. *Letter of attorney to discharge a mortgage of quit-claim.*

To release and discharge certain lands or any part thereof conveyed to me by E. F. by his deed thereof, dated —, upon payment being

made or other satisfactory security given in lieu thereof, and to that end to make, execute, acknowledge and deliver any deed or deeds, and any other papers that may be necessary for that purpose.

3. *Letter of attorney to execute leases generally, and receive rents.*

To sign, seal and interchange to and with any persons with whom said C. D. may contract, and for and upon such terms as said C. D. may agree, leases of the whole or any part of the following land, to wit: &c. hereby authorizing my said attorney to receive the rents which may become due on said leases, and to receipt for the same in my name, he accounting to me therefor.

VIII. NOTICES.

1. *Notice by landlord to tenant at will to quit, under the provisions of R. S. ch. 95, § 19.*

To A. B. For the purpose of determining your tenancy in the estate on — Street, in —, occupied by you, you are notified to quit the same forthwith.

2. *A like notice, in case of neglect to pay rent, under the provisions of the same section.*

To A. B. You are hereby notified to quit the premises in — Street, in —, belonging to me, and occupied by you, as you have neglected to pay the rent due for the same.

3. *A notice to a tenant, under a written lease, to quit, for non-payment of rent.*

To A. B. You are hereby notified to quit the premises belonging to me, occupied by you under a lease, dated, &c., as you have neglected to pay the rent due, according to the terms of said lease.

C. D.

4. *Notice of tenant to landlord of an intention to determine a lease.*

To C. D. In pursuance of a power contained in the indenture of lease executed by you to me, dated —, I notify you of my intention to determine the same on —, and I shall then deliver up to you possession of the demised premises.

A. B.

IX. RELEASE.

Know all men by these presents, that we, who have hereunto set our hands and seals, creditors of A. B. of —, in the county of —,

yeoman, in consideration that the said A. B. is indebted to us, his said creditors, in several sums of money which he is not able to pay in full, and to discharge and satisfy, have agreed, and do hereby agree to accept in full payment and satisfaction of all the debts owing to us respectively at the date hereof, the sum of fifty cents on the dollar of the amount of our respective debts ; and in consideration of the receipt of the foregoing sum of fifty cents on each dollar of the debts due to us respectively, each of us, the said creditors, who have hereunto set our hands and seals, doth for himself, his heirs, executors and copartners, remise, release, and forever discharge by these presents, the said A. B., his heirs, executors, and administrators, of and from our said several debts, and of all manner or cause of action against said A. B., which each and every one of us, our heirs, executors or administrators, may, can, or ought to have by reason of our said several debts, or by reason of any other matter whatsoever. And we do respectively, for ourselves, our executors, administrators and assigns, covenant with said A. B., his executors, administrators and assigns, that we will not sue him or them, on or for any debts or claims which we, or any of us, heretofore have had, or now have, against said A. B.

Dated at —, April 17th, 1851.

[L. s.]

X. WILLS.

1. *Commencement of wills.*

Be it remembered that I, A. B. of, &c. being of sound and disposing mind, do make, publish and declare this my last will and testament.

2. *Bequests and devises.*

These are arranged in order, under the heads, 1st, 2d, &c., thus :
 "First, I give and bequeath, &c."

3. *Appointment of executor, and in testimonium.*

And I do hereby appoint C. D. of — aforesaid, to be the sole executor of this my last will and testament, hereby revoking, annulling and declaring void all former wills by me at any time heretofore made. In witness whereof I have hereunto set my hand this — day of, &c.

4. *Attestation of wills.*

Signed, published and declared by the said A. B. as his last will and testament, in the presence of us, who in his presence and in the presence of each other, have hereunto set our names as witnesses.

If the will be signed by a third person for the testator, the attestation should be thus :

Signed by the said E. F. in our presence and in the presence of the said A. B. and by his express direction, and by the said A. B. at the same time published and declared as his last will and testament, in the presence of the said E. F., and of us, who each in the presence of the others, and of the said A. B. and of the said E. F., have hereunto set our hands as subscribing witnesses.

XI. AGREEMENTS.

1. *An Agreement for the Sale and Purchase of Land.*

Articles of ageement made and concluded this first day of January, A. D. 1851, at Portland, in the State of Maine, by and between A. B., of said Portland, trader, and C. D., of Scarborough, in the State of Maine, yeoman.

First. The said A. B., in consideration of the sum of — dollars, to him paid by the said C. D., (the receipt whereof is hereby acknowledged,) and in further consideration of the promise of the said C. D. hereinafter contained, doth hereby promise and agree to and with the said C. D., that he will, on or before the first day of July next, make and deliver to the said C. D., a good and sufficient deed, with the usual covenants of warranty, release of dower, &c., of all that tract of land situate, lying, and being in the town of —, in the county of —, and State of —, known as the —, &c. [or bounded and described as follows: —]

Second. In consideration whereof, the said C. D. doth hereby promise and agree to and with the said A. B., that he will, on such deed being tendered to him by the said A. B. on or before the said first day of July next, pay to the said A. B. the further sum of — dollars, in addition to the payment already made, being the balance of the purchase money hereby agreed upon for the said tract of land.

And to the true and faithful performance of all the agreements herein contained on the part of the said A. B. and C. D., each of them binds himself, his heirs, executors, and administrators, to the other and his heirs, executors, and administrators.

In testimony whereof we have hereunto set our hands and seals, on the day and year first above written.

A. B.
C. D.

Executed and delivered in presence of
E. F.
G. H.

2. *An agreement to be signed by an auctioneer, after a sale of land at auction.*

I hereby acknowledge that A. B. has been this day delared by me the highest bidder and purchaser of [describe the land] at the sum of

— dollars, [or at the sum of — dollars — cents per acre, or foot] and that he has paid into my hands the sum of —, as a deposit and in part payment of the purchase money : and I hereby agree, that the vendor, C. D., shall in all respects fulfil the conditions of sale hereto annexed. Witness my hand, at —, on the — day of —, A. D. 1851. J. S., Auctioneer.

3. *An agreement to be signed by the purchaser of lands at auction.*

I hereby acknowledge, that I have this day purchased at public auction all that [describe the land] for the sum of — dollars, [or for the price of — dollars — cents per acre, or per foot] and have paid into the hands of J. S., the auctioneer, the sum of —, as a deposit, and in part payment of the said purchase money ; and I hereby agree to pay the remaining sum of — unto C. D., the vendor, at —, on or before the — day of —, and in all other respects on my part to fulfil the annexed conditions of sale. Witness my hand, this — day of —, A. D. 1851. A. B.

4. *An agreement between several to purchase an estate, each to pay his proportion of the purchase money, charges, &c.*

Whereas it has been and is hereby agreed, that we, A. B., of —, merchant, and C. D., of —, yeoman, and E. F., of —, housewright, or some one of us on behalf of all, shall purchase that tract of land; situate, lying, and being in —, bounded and described as follows, to wit, [here describe the land] now owned and occupied by —, of —; now, we severally agree, that if any one or more of us shall purchase the said land, that each of us will pay a proportion, to wit, one third, of the purchase money, and that all charges and expenses relating thereto shall be borne by us in equal proportions, and that such purchase shall be to us as tenants in common [or as joint tenants] of the said land; provided, that the purchase money of the said land do not exceed — dollars, and provided also, that if either one or two of us do not pay his or their said proportion thereof, when demanded or required so to do in writing by the other or others, then it shall be lawful for either or both of the others to pay the same, and to take and hold the share or shares of the said party or parties not paying, to himself or themselves alone. Witness our hands, this — day of —, A. D. 1851.

5. *An Agreement in Articles of Purchase, as to the time of receiving Possession.*

And it is agreed between the said parties, that the said A. B. shall be let into possession of the premises on or before the — day of —

next; but that all arrears of rent and other profits arising from the said premises, which shall at that time be due or payable, shall belong to the said C. D., his heirs or assigns, and that he and they shall have full liberty to receive the same.

6. *Agreement for the sale of goods, &c., as they shall be appraised.*

Articles of agreement made between A. B., of —, and C. D., of —, &c.

It is hereby agreed by the said parties, that all and singular the household goods, furniture, and utensils, which are the property of A. B., and contained in and belonging to the dwelling-house now in the occupation of the said A. B., [or contained in the schedule hereunto annexed,] shall, at the joint and equal charge of the said parties, be appraised by E. F. and G. H., on or before the — day of —, when the said E. F. and G. H. shall, in writing by them signed, give in their appraisement to the said parties; and, in case the said appraisers shall differ in such valuation, then they shall choose a third indifferent person as an umpire, to determine the same, whose valuation of the said goods, within three days after his election, shall be conclusive, if signed and given or tendered to the said parties, or either of them. And the said A. B. doth covenant with the said C. D. that, immediately after such valuation, made by the said E. F. and G. H., or by such umpire as aforesaid, he, the said A. B., will make an absolute bill of sale, and give possession of all the said goods, furniture, and utensils, unto the said C. D., at the price the same shall be appraised at as aforesaid. And the said C. D. doth hereby covenant with the said A. B., that he the said C. D. will accept the said goods, at the said price, and, at the time of executing such bill of sale, and delivering possession of the said goods, furniture, and utensils, by the said A. B. will then pay to the said A. B. the sum of money for which the same shall be appraised as aforesaid.

In witness whereof, we have hereunto set our hands and seals, this — day of —, A. D. 1851.

7. *An Agreement to build a house according to a plan annexed.*

Be it remembered, that on this — day of —, A. D. 1851, it is agreed by and between A. B. of —, and C. D. of —, in manner and form following, viz.

The said C. D., for the considerations hereinafter mentioned, doth for himself, his executors and administrators, promise and agree to and with the said A. B., his executors, administrators, and assigns, that he, the said C. D., or his assigns, shall and will, within the space of — next after the date hereof, in good and workmanlike manner, and according to the best of his art and skill, at —, well and substan-

tially erect, build, set up, and finish one house or messuage, according to the draught or scheme hereunto annexed, of the dimensions following, viz., &c., and to compose the same with such stone, brick, timber, and other materials as the said A. B. or his assigns shall find and provide for the same. In consideration whereof, the said A. B. doth for himself, his executors and administrators, promise and agree to and with the said C. D., his executors, administrators, and assigns, well and truly to pay or cause to be paid, unto the said C. D. or his assigns, the sum of — in manner following, that is to say, the sum of —, part thereof, at the beginning of the said work; the sum of —, more, another part thereof, when the same shall be completely finished; and also that he the said A. B., his executors, administrators, or assigns, shall and will, at his and their own proper expense, find and provide all the stone, brick, tile, timber, and other materials necessary for making and building the said house. And for the performance of all and every the articles and agreements above mentioned, the said A. B. and C. D. do hereby bind themselves, their executors, &c., each to the other, in the penal sum of —, firmly by these presents. In witness whereof, &c

Executed and delivered in presence of

A. B.
C. D.

8. *An agreement between a master shipwright and his workmen for building a new ship, &c.*

Articles of agreement made between H. C., of, &c., and R. S., of, &c., and W. M., of, &c., of the one part, and J. S., of, &c., of the other part. Whereas the said J. S. hath contracted with T. C., of, &c., for building the hull of a new ship, of the dimensions contained in their articles of agreement, &c. &c.; now these presents witness that the said H. C., R. S., and W. M., for themselves, their executors, &c., do hereby covenant with the said J. S., his, &c., that they the said H. C., R. S., and W. M., their &c., for the considerations hereinafter mentioned, with materials to be provided by the said J. S., and at his charge, at his yard in R. aforesaid, shall perform the shipwrights' work and workmanship, according to the said recited articles of agreement, for the building of the hull of the said ship, in a substantial and workmanlike manner, to the content of the said J. S., and as he or his assigns shall appoint from time to time; and will launch the said ship on or about the — day of — next, and clear the launch wherein the said ship shall be built immediately after launching thereof. And the said J. S., for himself, &c., covenants with the said H. C., R. S., W. M., their, &c., that he the said J. S., his, &c., will pay to the said H. C., R. S., and W. M., their, &c., after the rate of — per ton for every ton of the said ship's burthen or tonnage, [carpenter's or other measure, and time and manner of payment as the

parties may agree,] within — days after the launching the said ship. In witness whereof, we the said [here repeat the names of all the parties] have hereunto set out hands and seals, this — day of — A. D. 1851.

9. *An agreement to engrave a set of cuts for a book.*

Articles, &c., [as before.]

The said B., [the engraver,] for the consideration hereinafter mentioned, doth for himself, &c., covenant with the said A., his, &c. that he the said B., at his own charges, will provide good and proper copper-plates, and will engrave thereon the effigy of every president of the United States, including the present president; and will, in a workmanlike manner, finish and deliver every such effigy within fourteen days next after every notice shall be given for the delivery of the same. And the said A., in consideration thereof, for himself, &c., doth covenant that he, the said A., or his, &c., will pay to the said B., upon the delivery of every such effigy as aforesaid, the sum of —.

In witness whereof, we, the said A. and B., have hereunto set our hands and seals, this — day of —, in the year 1851.

A D D E N D U M .

- ON page 335 of this volume, we have given a form of "complaint of three voters, that a certain person keeps liquors with intent to sell," in violation of the Act of 1851, entitled "An Act for the suppression of drinking houses and tippling shops." On account, however, of certain rulings by the judge of the district court for the western district, since the above form was put to press, we present the following as preferable. Of course, the Warrant must follow the language of the complaint.

Complaint of three voters that a certain person keeps liquors intended for sale.

STATE OF MAINE.

Cumberland, ss.

To A. B., of — Esq., one of the justices of the peace in and for said county of Cumberland: C. D., E. F. and G. H., being voters in said —, on the — day of —, in the year eighteen hundred and fifty—, in behalf of said State, on oath complain, that they have reason to believe, and do believe, that on the — day of — in said year, at said —, spirituous and intoxicating liquors were, and still are kept and deposited and intended for sale, by J. K., of —, in said County, said J. K. not being authorized to sell the same in said — under the provisions of the act entitled, "An Act for the suppression of drinking houses and tippling shops," in —, in said —; whereby said liquors have become forfeited to be destroyed, and said J. K., by reason of the premises, has incurred and become liable to pay a fine of twenty dollars to the use of said State, and costs of prosecution, or to be imprisoned thirty days in default of payment.

We therefore pray that due process may be issued to search said —. where said liquors are believed to be deposited, and if there found that the same may be seized and safely kept, until final action and decision be had hereon; and that said J. K. may be summoned forthwith to appear before the said justice at —, in said —, on the — day of — at — of the clock in the — noon, to make answer to this complaint, and to do and receive such sentence as may be awarded against him.

C. D., }
E. F., }
G. H. }

Cumberland, ss. On the — day of — aforesaid, at said —, the said C. D., E. F. and G. H., made oath, that the above complaint by them signed is true.

Before me,

A. B., justice of the peace.

INDEX.

- ABATEMENT**—distinction between pleas in, and motion to dismiss, 44.
judgment, how for the plaintiff, 70.
how for defendant, 70.
refusal to receive plea in, cannot be appealed from, 76.
plea in criminal proceedings to be verified by oath or other evidence, 207.
- ABDUCTION**—form of complaint, 338.
- ABORTION**—forms of complaint, 337.
- ABSENT DEFENDANT**—notice may be ordered to, 42.
judgment for plaintiff on default after notice, 42.
the form of such notice, 258.
judgment against, 75.
- ACCESSORIES**—in misdemeanors there are no accessories, 177.
who is an accessory before the fact, 177.
who after, 177.
punishment of, 177, 178.
forms of complaint against, 319, 320, 343.
- ACKNOWLEDGMENT.** See *Deeds*.
- ACTIONS**—how commenced, 26.
what is the commencement of, 26.
how to be entered, 41.
by non resident plaintiff, 54.
plaintiff in such action held to answer an action in favor of any defendant in the original action, 54. See *Judgment*.
when the cause of action survives, it may be prosecuted by or against the executor or administrator of a deceased plaintiff or defendant, 56.
executor or administrator may be summoned in, 56.
when the citation may be made returnable, and how it shall be served, 56.
what actions survive, 56.
who to prosecute or defend, on the death of joint plaintiff or defendant, 56.
in favor or against officers, 57.
on the death of all of several joint plaintiffs or defendants, 58.
on the marriage of feme sole plaintiff, husband may be joined, 58.
who to prosecute or defend in case of insanity of a party, pendent elite, 58.
in case of death or removal of a public officer or trustee, pendent elite, 57.
in case of sentence of death, or imprisonment for life, 57.
in case of bankruptcy, 58.
- ADJOURNMENT.** See *Continuance*.
- ADULTERY**—forms of complaint, 336.
- AFFRAY**—what an affray is, 304.
form of complaint for, 305.
may be suppressed on view, 165.
- AGREEMENTS**—forms for, 379—383.
- AID**—may be required by justices for quelling riots, 192.
may be required by officers, 199.
liability for refusing aid, 192, 199.
arrest by aid no trespass, though officer not present, 199.
form of complaint for refusing, 347.

AMENDMENT, in Civil Process—

- may be allowed on terms, 46.
- of form of action, 46.
- of name of defendant, 46.
- after plea of non-joinder of co-defendant, 46.
- writ to issue in such case for co-defendant, 46.
- how by discontinuing as to a part of joint defendants on default of the rest, 47.
- plaintiff may discontinue as to any defendant before the cause is committed, on payment of costs, 46.
- amendment should not be granted on an *ex parte* hearing, 47.
- amendment of substance of writ to be made on terms, 48.
- of return. See *Return*.
- of declaration. See *Declaration*.
- of pleadings. See *Pleadings*.
- certificate of discharge of a poor debtor may be amended, 50.
- records and clerical errors may be amended, 50.
- certificate of oaths also, by adding the words "justice of the peace," 50.
- lost writ. See *Writ*.
- material, not to be granted except on terms, 50.
- granted on motion in writing, 50.
- how to be made, 50.
- on death, marriage, or other disability of parties, 56.
- executor or administrator of deceased trustee may appear, 57.
- if he does not appear, judgment may be taken against him, 57.

APPEAL. See Recognizance.

- from judgment in civil actions to be made within twenty-four hours, 76.
- appellant to recognize, 76.
- to produce at appellate court copies, &c. 76.
- is confined to cases of final judgment, 76, 77.
- a trustee can appeal, 77.
- order for dismissal may be appealed from, 76.
- an appeal vacates the judgment, 76.
- may be had in replevin, 77.
- in forcible entry, 77, 116.
- recognizance in such case, 77.
- the mode of claiming appeal, 77.
- duties of the magistrate, 77.

In Criminal Cases—

- may be made from an order requiring sureties of the peace, 230.
- may be made from sentence of conviction, 230, 233.
- copy of whole process, to be sent up to D. C., 230.
- in cases of violation of act respecting intoxicating liquors, 231.
- an appeal properly taken vacates a judgment, 232.
- when recognizance should be furnished, 233.

APPEARANCE OF THE PARTIES—defendant not appearing, his default to be recorded, 41.

- plaintiff not prosecuting, &c. defendant to have judgment for his costs, 41.
- how may be made, 43.
- to note whether general or special, 43.

APPRAISERS—of estates of persons deceased, appointment of, 157.

- form of justice's order to appraise, 157.
- to be sworn, 157.
- of lost goods and stray beasts, how appointed, 157.
- of cattle impounded, when damage done by them is not paid, 158.
- of damages and costs of impounding, 158, 159.

AQUEDUCT—calling meeting of proprietors of, 161.**ARBITRATION—submission by agreement before a justice, 153.**

- parties to, shall sign and acknowledge agreement of, 153.
- form of such agreement, 153.

ARRAIGNMENT—what it is, 205.

- how to be made, 205.
- how if prisoner stands mute, 205.

- ARREST**—what is an arrest, 188.
 person arrested must be taken into custody, 188.
 service of writ by arrest, 36.
 defendant must be liable to arrest, 37.
 who are exempt from arrest, 37, 38.
 of offenders, 188.
 without warrant, 188.
 by whom may be made, 189.
 when a private person may arrest without warrant, 189.
 when he will be liable for making such arrest, 189.
 what are reasonable grounds of suspicion, 189, 190.
 must be of the person making the arrest, 190.
 proceedings after an arrest by a private person, 190.
 when arrests may be made by officers without warrant, 190.
 may arrest on suspicion of another, though there were no felony, 190.
 when magistrates may arrest without warrant, 191.
 may command an arrest, 191.
 of refusal to assist, 192, 198.
 not to proceed to judgment without regular process, 191.
 may arrest for certain affrays on view, 192.
 neglect of magistrate to do his duty, 192.
 may quell riots, &c. and arrest rioters, 192.
 armed force called out, 192.
 may be made for wilful disturbance of courts, 193.
 an officer may use force necessary to make the arrest, 194.
 how far a private person may justify breaking doors, 194.
 how far an officer may justify the same, 194.
 under warrants, 195.
 should be made immediately, 195.
 officer not a trespasser for acting under a legal warrant, 195, 196, 197.
 when doors may be broken, 197.
 the doors of houses of third persons may be broken, 197.
 may be made in night time, 197.
 and on the Lord's day, 197.
 cannot be made after the return day of the warrant, 198.
 may be made in any county, 198.
 may command aid, 198. *See Aid.*
 after arrest for certain offences, prisoner to be taken before magistrate for bail,
 out of the county where the offence was committed, 198.
 if not bailed, or if the offence be punishable by death or imprisonment in the state
 prison, to be taken before the magistrate issuing the warrant, 198.
 when the officer may delay bringing up the prisoner, 199.
 arrest may be made after escape, or rescue, 200.
 what is rescue, 200.
 how to be made when the defendant is in custody on another charge, 201.
ARSON, &c.—forms of complaint, 338, 339.
ASSIGNMENTS—forms for, 369, 370.
 of claim against trustee by principal defendant, 106.
ASSAULT—forms of complaint for, 297—300.
 how punished, 228.
 what is an, 297.
 what are aggravated, 297.
ASSAULT AND BATTERY—is but one crime, 296.
 intention with which the act is done is material, 296.
 what will justify forcible injuries, 296.
ATTESTATION—of papers filed in judicial proceedings, to be made in all cases, 43.
ATTENDANCE—of parties, amount allowed in bills of costs, 92.
ATTORNEY FEE—amount taxed for in bills of costs, 90, 91.
AUGUSTA—municipal court of, 170.
BAIL, in civil actions—
 costs on in scire facias, 89. *See Costs.*
 what bail bond is, 111.

- proceedings against. *See Scire facias.*
 what will discharge bail, 112.
- In Criminal Proceedings*, what it is, 235.
 what are bailable offences, 235.
 to be taken on habeas corpus, 236.
 to be taken by two justices of the quorum, when persons are committed for bailable offences, 236.
 of admitting prisoners to bail, under act of 1850, 163, 164.
 form of the condition of the recognizance, 172.
 how sureties of the peace may surrender the principal, 185.
 to be taken by magistrates in bailable cases, when there is cause to believe prisoner guilty, 235.
 to be taken by recognizance, 236.
 by whom to be taken, when persons are committed for bailable offences, 236.
 in what cases may be taken by magistrate, at prisoner's request, without examination, when he is arrested out of the county where the offence was committed, 198.
 to be taken, if offered, in all cases not capital, for appearance at adjourned examination before a magistrate, 237.
 by magistrate, after examination, in all cases bailable by him, 235.
 on habeas corpus, in all bailable cases, 236.
 of persons committing crimes in other states, and demanded by the executive thereof. *See Fugitives from Justice.*
 all offences bailable except capital, 239.
 not to be granted after conviction, when absconding, 239.
 although party apprehended on a new warrant, 239.
 excessive bail not to be required, 240.
 not to be refused or delayed, 240.
 to require parties to appear the first day of the term, 242.
 original recognizance of a party to be sent up with the papers where he is bound over, 242.
 and where he recognizes for further examination, 242.
 and the like of a witness' recognizance, 242.
 and also a recognizance of one accused of a crime committed in another state, 238.
 and recognizance for good behavior, 239.
 a recognizance taken by a magistrate before whom the proceedings were not had, to be returned to the court to which the accused is to appear, 242.
- BANGOR**—police court of, 170.
- BANKRUPTCY**—of parties to actions, 58.
- BANS**—reasons for forbidding, to be left with town clerk, 158.
 application to two justices to determine, 158.
 costs in proceedings, 159.
- BARRETRY**—form of Complaint, 339.
- BASTARD**—mother may institute complaint, 139.
 warrant may be issued, 139.
 bond, and commitment for want of, 139.
 form of complaint, 140.
 form of warrant, 140.
 how to be served, 140.
 form of bond, 141.
 form of mittimus, 141.
 complaint may be made by married woman, the husband joining, 140.
 infant need not complain by next friend, 140.
 statute of limitations no bar, 140.
- BATH**—municipal court of, 170.
- BILL OF PARTICULARS**—in civil cases, what it is, 50.
 when it may be ordered, 51.
 may be ordered in criminal process, 206.
- BILLS OF SALE**—forms of, 370.
- BLASPHEMY**—form of complaint, 339.

- BOND**—directions for writing, 371.
forms of, 370.
- BREACHES OF THE PEACE**—how punished, 228.
form of complaint, 305.
- BRIBERY, &c.**—forms of complaint, 340, 341.
- BRUNSWICK**—municipal court of, 170.
- BRIDGES**—organization of proprietors of private, 161.
- BURGLARY, &c.**—forms of complaint, 341—343.
- BY-LAWS**—how breaches of, may be punished, 229.
- CAPIAS**—form of writ of, 253.
when proper, 28.
distinction between, and *capias* and attachment, 28.
service of, 28. *See Arrest.*
for witness, when to issue, 69.
form of, 261, 281.
for arrest of a poor debtor in certain cases, 120.
- CAPIAS OR ATTACHMENT**—when proper, 28.
service of, 28.
- CARRIERS AND OTHERS**—embezzlement by, how punished, 227.
- CERTIORARI**—writ of, when may be issued, 81.
duties of the justice in regard to, 82.
his return upon, 82.
form of return, 266.
- CERTIFYING PROCESS**,—recognizance of a party recognizing for further examination, defaulted, to be certified to D. C., 251.
recognizance taken under R. S. ch. 171, to be certified to D. C. on or before first day of term, 251.
orders discharging recognizances to be filed before the term to which parties are recognized, 251.
recognizances for keeping the peace, to be certified to D. C., 251.
on appeal, to certify copy of judgment and costs, 251.
recognizance for appearance before another magistrate to be certified to him, 252.
how costs are to be certified and paid, 252.
the whole record to be certified, 251.
- CHILDREN**—truant, 228.
- CIRCUMSTANTIAL EVIDENCE**, 217.
See Evidence. Presumption.
- CITY ORDINANCES**—violations of, how punished, 228.
- COMMITMENT**—for not recognizing when examination is adjourned, 203.
for not finding sureties for appeal, 230.
of witnesses, for refusing to recognize, 242.
of a party convicted, 243.
for not furnishing sureties of the peace, 242.
on convictions, may be made to what place, 243.
justice in a different county from that in which the offence was committed, cannot order, 244.
is made by mittimus, 248.
the requisites of a mittimus, 244, 245. *See Mittimus.*
- COMPLAINTS**—under bastardy act. *See Bastard.*
for costs, 41.
in Criminal Cases. What it is, 177.
forms of, and warrant, 279.
to whom to be made, 177.
when, of an offence committed on the boundary of two counties, 177.
to be made with technical accuracy, 177.
not to be quashed for want of, where jurisdiction is initial, 172.
what must be alleged, 172.
parties, how described, 173.
how if names are unknown, 173.
offence, time and place of, to be set forth, 173.

- except in material circumstances, and certain offences of omission, &c. 173.
- facts, &c. to be alleged with certainty, 173.
- alleging a statute offence, in the words of the statute, not in general sufficient, 174.
- exceptions created by statute to be negatived, when &c. 174.
- immaterial averments may be rejected, 174.
- in larceny, value of articles taken to be set forth, 175.
- evil intent to be alleged when, 175.
- written instruments to be set forth at length, 175.
- not to be charged with duplicity, 175.
- material allegation not to be repugnant, 176.
- when several defendants may be joined, 176.
- may not be received upon suspicion, when the offence is within final jurisdiction, unless, 176.
- may be, if the offence is beyond final jurisdiction, 176.
- to be verified by oath of complainant, 172.
- may refuse to receive, 176.
- form of certificate, on examination of complainant, 262.
- CONFESSIONS**—to be received with caution, 211.
 - judicial, what they are, 212.
 - prisoner to be cautioned against making, 212.
 - collusive, to be guarded against, 212.
 - extra judicial, may be express or implied, 212.
 - must be voluntary, &c. 212.
 - credit to be attached to voluntary confessions, 212.
 - what inducements will exclude confessions, 212.
 - how determined whether voluntary or not, 213.
 - not necessary that it should have been the spontaneous act of the prisoner, 214.
 - the whole said by the prisoner must be put in, 214.
 - what are implied confessions, 214.
 - confessions of accomplices, when admissible, 214.
- CONSPIRACY**—form of complaint, 344.
- CONSTABLES**, See *Officer*.
 - to serve processes directed to them, 28.
 - although interested in certain cases, 29.
- CONTINUANCE**—actions may be continued, 58.
 - practice in civil actions, 58.
 - when executors, &c. to be summoned in, 59.
 - cannot be ordered prior to the return day, 59.
 - of suit when defendant is summoned as trustee of plaintiff, 101.
- CONVICTION**—not to be made except by court having competent jurisdiction, 219.
 - record of, 287.
 - sentence to be awarded upon, 218.
- CORONER**. See *Officer*.
 - to serve writs where a sheriff is party or interested, 29.
- CORPORATIONS**—form of application to justice to call meeting, there being no person authorized so to do, 271.
 - form of warrant, 271.
 - forms of organizing, &c. 271, 272, 273.
- COPIES**—fees for, 93.
- COSTS**. See *Judgment*.
 - form of complaint for, 258.
 - where complaint for, may be made, 41.
 - judgment for, on nonsuit, 71, 86.
 - judgment for, when defendant prevails, 85.
 - when to be taxed when profit is made of money in court, 72.
 - how if taxed and not paid in, in such case, 72.
 - party prevailing in civil actions to recover, 85.
 - on a profit of money in satisfaction, 86.
 - on set off, 86.
 - on several actions which might have been joined, 86.

OSTSC—of former suit discontinued, &c. to be paid before new suit for the same cause shall proceed, 86.

on abatement or dismissal of action, 85.

how for dismissal for want of jurisdiction, 85.

when costs may be imposed or withheld, 86.

against infant suing by next friend, 86.

against a defendant summoned and charged as trustee of the plaintiff during the pendency of the suit, 87.

against executors and administrators, 87.

in actions ex contractu against several defendants, 87.

in actions ex delictu, 87.

in trustee process to be taxed at same rate as defendant, 87.

if charged, to be retained from goods, &c. in his hands, 87.

when plaintiff discontinues his suit, what, 87, 88.

if discharged, to have execution for costs, 89.

how, if trustee be out of state at the time of service, 88, 89.

how if he does not reside in the county where the writ is returnable, 87, 108.

if trustee residing in the county does not appear at return day, without cause, liable for plaintiff's travel and attendance, unless, &c. 88.

when execution to be awarded for, 88.

what costs trustee liable for on scire facias, 88, 89.

on death of trustee before judgment, 89.

may be allowed in certain cases, 90—94.

costs of trustees, how to be taxed, 89, 108.

for plaintiff's travel, &c. 90.

costs against bail on scire facias, 89.

costs to be paid within fifteen days after surrender, unless, &c. 90.

not to be taxed without notice to adverse party, if notice be given of desire to be present, 90.

what to be allowed to parties, 90.

bill of costs to be taxed by parties and examined by justice, 90.

to be certified by magistrate, 90, 94.

See *Writ, Power, Service, Travel, Entry, Attendance, Trial, Witness, Deposition, Copies, Attorney's Fee.*

in proceedings for determining objections to marriage, 159.

In *Criminal Proceedings*, 247.

taxation of, 247, 248, 249.

form of, 283, 284.

CROSS EXAMINATION—each party right to, 69.

trustee cannot be cross-examined, 97.

DEATH. See *Actions.*

DECLARATION—writ must contain a declaration, 49.

cannot amend a writ without a declaration by adding one, 49.

but a declaration in the writ may be amended, 49.

DEEDS—forms of, 371, 373.

acknowledgment of, to appear on the deed, 151.

form of common certificate of acknowledgement 151.

acknowledgement by attorney, 151.

by corporation, 151.

by wife, 151.

if grantor refuse to acknowledge, he may be summoned, by a justice, to hear testimony of subscribing witnesses, 151.

how summons to be served, in such case, 151.

form of application, 152.

form of summons, 152.

may be proved before the justice by the subscribing witnesses, 152.

justice shall certify proof thereon ; contents of certificate, 152.

form of a certificate, 152.

without a subscribing witness shall not be proved, 153.

acknowledgement not to be made before grantee, 153.

may be taken out of the county, 153.

- DEFAULT**—offer to be defaulted, 54, 55.
 judgment may be rendered upon, 41, 71.
 to wait one hour before default, 42.
 may wait longer, 42.
 of default of one or more joint defendants, judgment may be taken against them alone, 42.
 assessment of damages on, a matter for the court, 70.
 how this is to be done, 70.
 when unliquidated, a hearing necessary, 71.
 care necessary in entering up judgment, 71.
 form of offer to be defaulted, &c. 259, 260.
- DEMURRERS**—in criminal proceedings, 206, 207.
 judgment on, 207.
- DEPONENT**—may be summoned and compelled to give his deposition, at any place within thirty miles of his abode, 146, 147. See page 69.
 shall be sworn or affirmed to testify the truth, the whole truth, &c. 147.
 shall be examined by the justice taking his deposition, and by the parties, 147.
 to be examined first by party producing him, and then by the adverse party, and afterwards by either, 147.
 on verbal or written interrogatories, 147.
 shall subscribe his deposition after it has been read to him, 147.
 See *Witnesses*.
- DEPOSITIONS**—if the deponent is ignorant of the English language, should be sworn through a sworn interpreter, 67.
 taxable fees for, 93.
 not to be taxed unless depositions are used, 93.
 for foreign depositions, at the discretion of the court, 93.
 how deponents shall be summoned, examined, &c. 148.
 when and by whom depositions may be taken, 40.
 to be used in civil causes pending, may be taken when witness is more than 30 miles from place of trial, &c. 144.
 for what other causes, 144, 145.
 notice of taking, form of, 146.
 in what manner, and at what time, to be served on adverse party, 145, 146.
 justice or notary may give verbal notice, 145.
 may be issued by the justice who is to take, or by any other justice, 151.
 interrogatories, by whom written, 147.
 certificate of time and manner of taking, &c. &c. to be annexed thereto by the justice, 147.
 fees of justice for taking, &c. 148. Form of, 148.
 to be delivered, or sent under seal, by the justice, to the court, &c. 148.
 when sealed up, to remain so, till opened by court, &c. 148.
- DEPOSITIONS**—to perpetuate testimony, 148.
- DISCONTINUANCE**—of actions, not allowed after set-off filed, 58.
- DISTURBANCE**. See *Worship*.
- DOCKET**—names of parties to be entered in, 41.
 memorandum in, when execution issues, 79, 81.
 entry to be made when bail surrenders principal, 112.
 when bail bond is filed, 112.
 memorandum of issuing warrant, &c. 179.
 mittimus, 306.
- DOORS**—when may be broken open, 195, 197.
 admittance should first be demanded, 197.
- DRUNKARDS**—common, how punished, 220.
 form of complaint, 306.
- DRUNKENNESS**—how punished, 220.
 form of complaint, 306.
- DUELLING**, &c.—forms of complaint for, 359, 360.
- DUPLICITY**—complaints bad for, 175.
 certain charges not bad for duplicity, 175.

EMBEZZLEMENT—how punished, 226.

by carriers and others, 227.

forms of complaint, 308—311.

ENTRY—of action to be made before the magistrate personally, 41.

justice's fee, 92.

minute in docket at the time of, 41.

fee, amount of in bill of costs, 92.

ESCAPES, &c.

forms of complaint, 345.

EVIDENCE. See *Witnesses, Depositions, Oaths.*

what two kinds, 60.

books of account, 61.

records, &c. of courts in other states, when admissible, 67, 68.

printed statutes of this state admissible, 68.

statutes of other states, when admissible, 68.

how the common law may be proved, 68.

how foreign laws may be proved, 68.

official registers, 68.

In Criminal Proceedings,

no person bound to furnish against himself, 210.

the magistrate the judge of the tendency of the question, 211. See *Confessions.*

who may be witnesses in forgeries on banks, united states, &c. 285.

parties to record not compelled to testify, 216.

conclusive required of offences within the final jurisdiction of a justice, 216.

sufficient to raise suspicion in cases beyond final jurisdiction, 216.

must tend to prove or disprove the issue, 216.

prima facie evidence, is what, 217.

conclusive evidence, is what, 217.

direct evidence, is what, 217. See *Credibility. Witnesses.*circumstantial evidence, is what, 217. See *Presumption.***EXAMINATION OF OFFENDERS**—to be had before the magistrate issuing the

warrant, or a magistrate of the same county, 202.

may be adjourned, not exceeding ten days, 202, 237. *Commitment.*

of the course of the examination, 204.

defendant may have counsel, 204.

witnesses may be kept separate, 204, 218.

testimony may be reduced to writing, 204.

when prisoner should be discharged, 204.

when to be ordered to recognize, 202, 204.

form of order to bring prisoner up for further examination, 261.

EXECUTION—forms of the various kinds of, 263, 264, 265.

generally not to issue within 24 hours after judgment, 78.

exclusive of Lord's day, 78.

original not to issue unless within one year after entitled to, 78.

not on judgment appealed from, 78.

to be made returnable within three months, 78.

against absent defendant, plaintiff giving bond, 78.

issuing a ministerial process, 78.

should follow the judgment, 78.

in the names of all the parties, 78.

how against persons privileged from arrest, 78.

to whom to be directed, 79.

memorandum to be made in docket after issuing, 79, 81.

when two separate may issue in same suit, 80.

how to be on death of joint plaintiff or defendant after judgment, 80.

scire facias, when necessary 80.*alias*, when may be issued, 80.

not till return of proceedings, 80.

memorandum to be made in execution on *alias issues*, 81.

when may be issued on judgment rendered by a deceased justice, 81.

when by a justice after his commission has expired, 81.

EXECUTORS, &c.—suits by and against. See *Actions*.

EXTORTION—forms of complaint for, 347, 348.

FALSELY PERSONATING—another, and thereby obtaining goods, &c. is larceny, 311.

what is essential to constitute the offence, 312.

evidence may be received of the acts of one joint defendant done with the consent of the other, 312.

false pretences to a clerk is an offence within the statute, 312.

form of complaint, 312.

FALSE PRETENCES—forms of complaint, 343, 344.

FEES—officers must expose list of fees, 85.

in civil proceedings, 83, 84, 86.

in criminal proceedings, 246.

form of complaint, 315.

FIDDLERS, &c.—how punished, 220.

form of complaint, 316.

FINES, &c.—to be accounted for, when, 252.

FIREWORKS, 228.

FORCIBLE ENTRY AND DETAINER—form of complaint and warrant, 255.

what is judgment for plaintiff, 73.

when the process of forcible entry allowed, 114

who have jurisdiction, 115.

proceedings in the suit, 115.

judgment, when for the plaintiff, 115.

when for the defendant, 115.

what is a disseizor, 116, 117.

proceedings when title is concerned, 116, 117. See *Appeal. Recognizance*.

what the notice to quit must be, 117.

what case the statute provides for, 117.

what is a tenancy, 117.

tenancy must be determined, 117.

tenants at sufferance entitled to no notice, 117.

how tenancies at will are terminated, 117.

tenancy at will may be determined by its own limitation, 117.

FORFEITED GOODS—by whom forfeited goods may be seized, 118.

when may be returned to claimant, 119.

value how ascertained, 119.

the libel to be filed, 119.

what notice to be made, 119.

proceedings in, 119.

depositions may be used, 119.

FORFEITURES. See *Penal Actions*.

FORGERY AND COUNTERFEITING—forms of complaints for, 348—353.

FORMER ACQUITTAL AND CONVICTION—on what principle the plea of, founded, 207.

the court must have had final jurisdiction, 208.

the offence must have been the same, 208.

the test to determine the identity, 209.

a formal acquittal or conviction procured by fraud no bar, 209.

defendant to prove at once the truth of plea, 209.

FORNICATION—form of complaint, 353.

FUGITIVES FROM JUSTICE—warrants for apprehension, &c., of, may be issued by courts and magistrates, on proper complaint under oath, 185.

form of complaint, warrant, &c., 292, 293.

apprehended by warrant of court, &c., may be required, if not charged with

a capital crime, to recognize to appear at a future day certain, 185, 238.

shall be committed if they do not so recognize, or if charged with a capital crime, 185.

to be discharged on such future day, unless ordered for good cause to recognize anew, 186.

or unless demanded by person authorized by governor to receive them, 186.

- FUGITIVES FROM JUSTICE**—may be taken on governor's warrant, while committed, or under recognizance, 186.
such taking of, shall discharge their recognizance, and shall not be deemed an escape, 186.
expense of arrest of, and of their support in prison, to be paid by complainant, 186.
when committed, as above, may be discharged by jailer, if charge for their support be not advanced or secured, 386.
- GAMING**—innholders keeping implements for or suffering, 313.
persons gaming in public houses, how punished, 223, 313.
at unlicensed houses, how punished, 223.
forms of complaint, 313—315.
- GARDINER**—police court of, 171.
- GUARDIANS**—suits by and against. See *Actions*.
- HABEAS CORPUS**—form of writ of, 164.
bail may be taken, when, 236.
- HOUSES OF CORRECTION**, 243.
- HOUSES OF ILL FAME, &c.**—forms of complaint, 353.
- HUSBAND AND WIFE**. See *Actions*.
feme sole trustee marrying, what, 107.
form of motion to be joined, by husband, 261.
- IDIOCY**—See *Actions*. *Insane Persons*.
- IDLE PERSONS**—how to be punished, 220.
- INCEST**—form of complaint, 354.
- INTERPRETER**—to be sworn where a witness is ignorant of the English language, 67.
- INDORSEMENT**—of writs, 32. See *Writs*.
- INFECTIONS**—proceedings in cases of, 160, 161, 162.
- INN-HOLDER**, 222. See *Gaming*. *Lord's Day*.
- INSANE PERSONS**—proceedings in cases of, 134.
- INSANITY**. See *Actions*. *Idiocy*.
excludes the testimony of a witness, 60, 64.
- INSOLVENCY**—of parties, 58.
- INTEREST**—when an interested witness may testify, 63.
- INTOXICATING LIQUORS**, 223, 224, 226, 334, 383.
forms of complaints and warrants, 334—336. See *Addendum*, for improved form of complaint, 333.
- ISSUE**—not to be altered after trial has commenced, 60.
fee to justice for issue, 92.
- JAILS**—for what purpose to be used, 244.
- JOINDER**—when several defendants may be joined in criminal proceedings, 176.
- JUDGMENT**—what it is, 70.
when may be rendered on default, 70.
cannot be taken against a joint defendant defaulted if the other defendant prevails on trial, 47.
cannot be rendered if the writ contains no declaration, 49.
in a cross-action by defendant against non-resident plaintiff may be set off, 54.
against executors and administrators, 52.
in case of set-off where the demands are equal, 53.
where there is a balance due from the plaintiff, 53, 72.
when against executors, &c. of trustee, 57.
no judgment in neither party, 70, 72.
the judgment on pleas in abatement. See *Abatement*.
on default. See *Default*.
on nonsuit. See *Nonsuit*.
on tender. See *Tender*.
on trial, to be rendered on the facts proved only, 71.
how if for plaintiff, and how if for defendant, 71.
in replevin. See *Replevin*.
in forcible entry, &c. See *Forcible Entry*.
against trustee, need not specify the sum, 73.
how against executor, &c. adjudged a trustee, 74.
how in case of death of defendant pendente lite, 74.

- JUDGMENT**—how against executor, &c. summoned on default, 74.
 against such appearing, 74.
 in scire facias for waste, 74.
 trespass on property, 74.
 cannot be awarded for more than \$20 debt or damages, 74.
 may be appealed from, 76. See *Appeal*.
 if unsatisfied on the death of the justice rendering it, the record may be transcribed by another justice of the same county, 81.
 summons to executor &c. of deceased justice in such case, 81.
 against a defendant summoned and charged as the trustee of the plaintiff during the pendency of the suit, 89.
 for costs of a trustee, 88. See *Costs*.
 on demurrer in criminal proceedings, 206.
 on pleas in abatement in the same, 206.
- JUDICIAL ACTS**—what are, 21.
 the distinction between and ministerial, 21.
- JUGGLERS**—how punished, 220.
 form of complaint against, 315.
- JURISDICTION**. See *Justice of the Peace*.
 how obtained in civil matters, 22.
 costs when writ is dismissed for want of, 85.
 plea to in criminal proceedings, 207.
- JUSTICES OF THE PEACE**—how created, 9.
 term of office, 9.
 precinct, 9, 11.
 incompatible with executive office, 9.
 to take the oath of office, 11.
Jurisdiction in Civil Matters derived from statute, 9.
 have exclusive original jurisdiction of civil actions where the demand is not more than \$20, except, &c. 12.
 exception of real actions, and others, where title to real estate may be concerned, 12.
 concurrent with D. C. in certain personal actions, 12.
 removal of actions where title to real estate is concerned, 12. See *Replevin*.
Forcible Entry.
 may compel the attendance of witnesses, 12.
 may compel witnesses to answer, 13.
 issue scire facias in certain cases, 13.
 form of summons to persons having records of deceased justice, 266.
 may issue execution on judgment of a deceased justice, 13.
 may issue execution on an unsatisfied judgment after the expiration of his commission, 13.
 may issue a writ of replevin when, 12, 117.
 in forcible entry and detainer, 10, 114.
 in penal actions, 142.
 forfeited goods, 14.
 lost goods, 14.
 in complaint for bastardy, 14.
 may punish disorderly conduct, &c. 15.
 not to be retained as counsel on appeal, &c. in a suit determined by him as justice, 15.
 to keep records of proceedings, 15.
 various forms of records, 274, 275, 276, 277, 278.
 may administer oaths where an oath is required by law, unless, &c. 15.
 to account for fines, &c. within six months, &c., 15.
 may issue summons for witnesses, 15.
 when he may issue summons for witnesses for defendants in criminal proceedings, 15.
 may cause paupers to be sent from the state or to the place of their settlement, on complaint of overseers of the poor, 16.
 may admit prisoners to bail, 163. See *Bail*. *Justices of the Quorum*.
 may take the acknowledgment of deeds, 16.

JUSTICES OF THE PEACE—may take depositions, 16.

may solemnize marriage, 16, 157.

may appoint appraisers of property, when, 17.

may demand license of pedlars, 17, 156.

may call meetings of corporations in certain cases, 17.

may organize certain corporations, 17.

may organize parishes, 17.

may take the acknowledgment of recognizances and agreements in certain cases, and of the certificates of partners to a limited partnership, 17.

jurisdiction in cases of infection and plague, 17, 161.

may receive the submission of parties to arbitration, 17, 153.

may, with the selectmen, order suitable watches, 18.

may take recognizance for debt, 17.

how far their civil jurisdiction is abridged by municipal, police, and town courts, 18.

what is a disqualifying interest, 20.

liability for judicial acts, 21.

for ministerial acts, 24.

to indictment, 24.

to impeachment, 26.

fees of in criminal proceedings, 246.

Jurisdiction in Criminal Matters.

to enforce laws for the preservation of the peace, 165.

may require sureties for peace, 165.

may punish assault, &c. by fine not exceeding \$10, 166.

cause to be arrested all affrays, &c. 165.

how may examine and punish such, 166.

may cause to be arrested all offenders, 164.

to examine into treasons, high crimes and misdemeanors, and bind over, 165.

may arrest certain offenders on view, 164.

divided into initial and final, 166.

final jurisdiction, what it is, 167.

in what cases, 167, 168.

only where the whole punishment can be inflicted, 168.

initial jurisdiction, what it is, 168.

in what cases, 169, 170.

how far abridged by municipal, police and town courts, 170.

JUSTICES OF THE QUORUM—distinction between, and justices of the peace, 10.

may examine and discharge poor debtors, 10, 121.

may admit to bail in certain cases, 10.

JUVENILE OFFENDERS—how to be punished, 229.**KIDNAPPING**—forms of complaint for, 354, 355.**LANDS**—held in common, organization of proprietors of into corporation, 17.**LARCENY**—how punished, 226.

definition of, 316.

distinction between simple and compound, 316.

article taken must have a value, 316.

must be personal property, 316.

what is made the subject of larceny by statute, 317.

what is a book of accounts, within the statute, 317.

what is a receipt within the statute, 317.

when an article is real, and when personal property, 317.

what must be alleged and proved, 317.

forms of complaint for various kinds, 318, 319.

forms against accessories, 319, 320.

LASCIVIOUSNESS—forms of complaint for, 353.**LEASES**—form of, 376.**LEGAL TENDER**—what is, 55.**LETTER OF ATTORNEY**—forms for, 376, 377.**LIBEL.** See *Forfeited Goods.*

form of, of goods seized, 267.

- LIBEL**—notice to persons interested, 267.
 writ of restitution, 267.
 libel of beast impounded, 270.
 decree of forfeiture, 270.
- LICENSED HOUSES.** See *Spiritous Liquors. Innholder.*
- LIMITATIONS**—*Statute of.*
 plaintiff may avail himself of, against a demand filed in set-off, 58.
 criminal proceedings to be commenced within six years, except, &c. 178.
- LITERARY SOCIETIES**—incorporation of, 17.
- LIQUORS.** See *Intoxicating Liquors, Addendum, 383.*
- LORD'S DAY**—forms of complaint for violation of, 321, 322.
 civil process cannot be served on, 35.
 criminal process may be, 197.
 violations of statutes in regard to, how punished, 221.
 no labor to be done on, except, &c. and no diversion to be attended on, 221.
 travelling on, not allowed, except, 221.
 what Lord's day includes, 222.
 complaints for violation, when made, 222.
 innholders, &c. not to entertain persons on, except travellers, &c. 222.
 innholders, &c. not to entertain certain persons evening preceding and following Lord's day, 222.
 a conscientious observer of the 7th day not liable to penalty for not observing the Sabbath, 222.
- LOST GOODS, 119, 120.**
 form of warrant to appraise, 269.
- MALICIOUS INJURIES AND WILFUL TRESPASS**—prosecutions, when commenced, 178.
 how punished, 227.
 forms of complaint, 323—325.
- MARRIAGE**—pendente lite. See *Actions.*
 in what cases marriage is forbidden, 156.
 what are void, 157.
 intention of marriage to be entered with town clerk, 157.
 how published, 157.
 certificate of publication to be given the parties, 157.
 to be required by the justice before performing the ceremony, 157.
 consent of parents, &c. to be obtained in certain cases, 157.
 no particular form necessary, 157.
 justice to keep records of marriages, 158.
 other matters, 158, 159.
- MAYHEM**—form of complaint for, 355.
- MINISTERIAL ACTS**—what are, 21.
 the distinction between, and judicial, 21.
- MISCHIEF.** See *Malicious Injuries, &c.*
- MITTIMUS**—various forms of, 280, 282, 285, 286, 288, 289, 290, 291, 292, 294.
 should be framed with accuracy, 244.
 must be in writing, 245.
 should recite the complaint, 245.
 should be in the name of the state, 245.
 the direction, 245.
 should describe the prisoner, 245.
 should allege the crime with convenient certainty, 245.
 should point out the place of imprisonment, 245.
 should state the length and mode of imprisonment, 245.
- MISNOMER**—of defendant in criminal process to be taken advantage of by plea in abatement, 209.
 may be waived, 210.
- MONEY**—what is legal, 55.
- MOTIONS TO DISMISS**—form of, 259.
 distinction between, and pleas in abatement, 44.
 may be made only for apparent errors, 44.

- MOTIONS TO AMEND**—form of, 259.
- MORTGAGES**—forms of, 373—375.
- MUNICIPAL COURTS**—jurisdiction of, 18, 19, 170, 171.
- MURDER, &c.**—forms of complaint for, 355—360.
- NIGHT-TIME**—in criminal proceedings, when dwellings may be searched, 180.
- NIGHT-WALKERS, &c.**—how punished, 220.
form of complaint, 316.
- NON-JOINDER.** See *Abatement*.
- NOLO CONTENDERE**—plea of, 205.
- NONSUIT**—what it is, 71.
includes complaint for costs, 71.
judgment on, is only for costs, 71.
- NOTE**—maker, &c. of, not to be adjudged a trustee therefor, 100, 104.
- NOTICE**—to quit, forms of, 377.
- NUISANCE**—on complaint, indictment, or action, may be abated, 159.
warrant for removal of, 159.
See *Infections*.
- OATH**—may be administered by justices, unless, &c. 15.
certificates of may be amended, 50.
when should be to make just and true answers, 67.
when the usual oath, 66.
how the oath should be administered, 66.
who may affirm, 67.
oath may be administered in the mode believed most binding by the witness, 66.
how to a witness ignorant of the English language, 67.
to be administered to poor debtors, 122, 127.
necessary to a complaint in criminal proceedings, 173.
for search warrant, 180.
- OBSCENE BOOKS**—form of complaint, 354.
- OFFENDERS.** See *Examination*.
- OFFICERS.** See *Sheriffs, Coroners, Constables, Service, Arrest*.
when not to be adjudged a trustee, 100.
liability for neglecting to serve criminal process, 195.
should not refuse to serve such, though complainant request it, 195.
not a trespasser when acting under a legal warrant, 195, 196.
may command aid. See *Aid*.
fees in criminal proceedings, 250.
- ORIGINAL SUMMONS**—form of the writ of, 27, 252.
when proper, 27.
how to be served, 36.
how to be served when defendant is out of state, 36.
- ORIGINAL ENTRIES.** See *Witnesses*.
when admissible in evidence on the oath of the party offering them, 61, 62.
- PARDON**—effect of to restore competency of witnesses, 65.
may be pleaded in bar to a complaint, 207.
- PARISHES**—organization of, 17.
- PARTNERSHIP**—limited, certificate of partners to, 274.
- PAUPERS**—proceedings in removing, 162.
- PENAL ACTIONS**—proceedings in, 142.
forms of complaint, 325.
- PEDLARS**—forms for demanding licences of, 156.
- PERJURY, &c.**—forms of complaint for, 361, 362, 363.
- PLEADINGS.** See *Motions to dismiss. Abatement. Demurrer. Former Ac
quital and Conviction*.
forms of the various pleadings, 260.
had better be reduced to writing, 43.
may be amended, 49.
except pleas in abatement, 50.
in criminal proceedings, 206, 207, 208, 209, 210.
- POLICE COURTS**—jurisdiction of, 18, 19, 170, 171.
- POLYGAMY**—forms of complaint for, 363.
- POOR DEBTORS**—of arrest and disclosure on meane process, 120.

- POOR DEBTORS**—forms of application to take the oath, &c, 268.
 of arrest and disclosure after judgment, 125.
 general principles, application, of certain specified cases, 130.
 proceedings in suit on bonds, 132.
 disclosure of debtors to the state, 133.
 disclosure under the bastardy act, 133.
 form of oath, by poor debtors, 127.
- PORTLAND**—municipal court of, 170.
- PRISONERS**—examination of. *See Examination.*
- PROFANITY**—how punished, 220.
 cannot be committed except by one arrived at the age of discretion, 326.
 form of complaint, 326.
- PROFERT.** *See Tender.*
- PROOF.** *See Evidence. Witnesses.*
 strict required of offences within the final jurisdiction of a justice, 216.
 sufficient to raise a suspicion, in cases beyond his final jurisdiction, 216.
- PUBLIC SHOWS**—without license, how punished, 228.
- RAPE, &c.**—forms of complaint for, 363, 364.
- REAL ESTATE.** *See Title to Real Estate.*
- RECEIVERS**—of stolen goods, how punished, 226.
- RECORD OF PROCEEDINGS**—shall be kept by justices of the peace, 15.
 errors in which may be amended, 50.
 of a deceased justice, how to be transcribed, 81.
 entry to be made in when bail is surrendered, 112.
- RECOGNIZANCE**—forms of, 262, 284, 287, 294.
 to be entered into with sureties by appellant from judgment in civil actions if
 required by appellee, 76.
 in forcible entry to be for rent in certain cases, 116.
 original to be sent to the appellate court, 77.
 copy to be entered in records, 77.
 fees for to be certified, 77.
 justices fee for taking, 94.
 importance of good sureties in, 240.
 how sureties are to be examined, 240.
 of a party appealing from an order to find sureties of the peace, 184.
 to what court to be transmitted, 184.
 when part of the penalty may be remitted, 185.
 of fugitives from justice, 185, 238.
 of prisoners when examination is adjourned, 203.
 forms of mittimus for not recognizing, 280, 283, 286, 288.
 of witnesses in criminal proceedings. *See Witnesses.*
 good sureties to be required, 240.
 if insufficient are furnished, new may be required, 241.
See Sureties to Recognizances.
 must show the cause of taking, 241.
 the various kinds of recognizances that may be required in criminal proceedings, 219.
 of the disposition to be made of the recognizance, 241.
 form of the record to recognize, 283.
- RECOGNIZANCES FOR DEBTS**—who may enter into, 154.
 form of the recognizance, 154.
 to be attested by the justice and recorded, 155.
 how and when execution to issue, 155.
- REFERENCE**—of disputes, 153.
- RELEASE**—form of, 377.
- REPLEVIN**—form of writ, 257.
 for beasts when to be removed to D. C. at the request of either party, 45, 118.
See Judgment. Appeals.
 form of writ, when cattle are impounded, 256.
 judgment in, what for plaintiff, 73.
 what for defendant, 73.

- REPLEVIN**—writ of may issue for beasts, &c. 117.
 bond, 118, 119.
 jurisdiction confined to cases of beasts impounded, &c. 118.
 goods may be replevied, 118.
- RESCUE**—arrest may be made after, 200.
 what a rescue is, 200.
 penalty for furnishing the means of escape to a prisoner, 200.
 for assisting in an escape, 200.
- RETAILER.** See *Spirituuous Liquors.*
- RETURN**—of writs by officers, 40.
 effect of, 40.
 alteration in, 40.
 may be amended after judgment, 48.
 and after the officer's term of office has expired, 48.
 should not be allowed if it affects the rights of third parties, 48.
 of officer conclusive on bail, 118.
 of warrants, how to be made, 202.
 officer to annex to a return of a warrant for larceny a schedule of property secured, 202.
 certificate of fees to be annexed, 202.
- RIOTS, &c.**—forms of complaints for, 364, 365.
 justices may arrest rioters, 166.
 may command to disperse, 192.
 may command assistance on refusal, 192.
 persons refusing to disperse to be deemed rioters, 192.
 liability of justice, &c., for neglecting his duties, 192.
 magistrates, &c. to command assistance in arms, in case of refusal of rioters to disperse, 192.
 whose orders force called out are to obey, 192.
 persons acting under order of the magistrate, &c. to be held guiltless, &c. 193.
- ROAD**—form of complaint for offence against law of, 325.
- ROBBERY**—forms of complaint for, 365, 366.
- ROCKLAND**—municipal court of, 171.
- SACO**—municipal court of, 170.
- SCHOOLS**—disturbing schools, how punished, 230.
- SCIRE FACIAS**—on judgments, when necessary to enforce, 80, 108, 109. See *Execution.*
 costs in, against trustees. See *Costs.*
 what a writ of scire facias is, 108.
 can only issue from the court having the record, 108.
 may issue against executors, &c. and bail, &c. 107, 108.
 on judgments, after a certain time, 74, 109.
 on recognizances, 109.
 against trustee, when it lies, 109, 110.
 judgment upon default, 110.
 how if trustee appears, 110.
 against executor, &c. of trustee, 108.
 how with a mortgagee or pledgee, 111.
 against bail, 109, 111.
 what is a bail bond, 111, 112.
 writ may issue though debt and cost exceed \$20, 112.
 action to be commenced within one year after judgment, 112.
 of the pleadings in scire facias against bail, 112, 113.
 bail may surrender principal, 112.
 how this is to be done, 112.
 what will discharge bail, 112, 113.
 death of principal before and after return of execution, 113.
 enlistment in service of U. S. no discharge, 113.
 discharge of principal in bankruptcy before bail is fixed, 113.
 how if principal becomes exempt from arrest after service of meane process, 113.
 on death of parties after judgment, 113.

- SCIRE FACIAS**—not necessary unless all plaintiffs or defendants die, 114.
 death or removal of executor, &c. 114.
 marriage of feme sole plaintiff or defendant, 114.
 against executors, &c. on suggestion of waste, 114.
 amount for which judgment to be awarded, 114.
 form of writ, 255.
- SEARCH WARRANT**—what it is, 179.
 must be supported by oath, 180.
 form of complaint for, and warrant, 326, 327.
 in what cases it may be issued, 180.
 to whom to be directed, 180.
 to authorize search in day time, 180.
 how the place to be searched shall be described, 180, 182.
 to require the arrest of certain persons, 180.
 when it may require a search in the night-time, 180.
 the officer serving to seize and keep the property, 181.
 the disposition to be made of the same, 181.
 when may be issued for implements of gaming, 181.
 to search for smuggled goods in the day time only, 181.
 to search for intoxicating liquors, when, 181, 182.
 how particularly the goods shall be described, 182.
 when officer will be protected in service of, 201.
- SENTENCE**—to be awarded by court upon conviction, 220.
 for drunkenness, 220.
 for vagabonds, public disturbers, &c. 220.
 profanity, 221.
 violation of the Lord's day, and disturbing public worship, 221.
 gaming, 222.
 violations of the act for the suppression of drinking houses and tippling shops,
 223.
 larceny, 226.
 receiving stolen property, 226.
 embezzlement, 226.
 by carriers and others, 227.
 malicious injuries and wilful trespasses, 227.
- FIREWORKS**, 228.
 breaches of the peace, 228.
 shows, 228.
 violating city ordinances, 229.
 truant children, 229.
 disturbing schools, 230.
- SEPULTURE**, &c.—forms of complaints for violating, 366, 367.
- SERVICE OF PROCESS**—of *Writs*, not to be served on Lord's day, 35.
 to be served not less than 7, nor more than 60 days before the return day, 35.
 when to be served in actions against towns, &c. 35.
 to be served upon all the defendants, 35.
 when and how to be served on corporations, 35.
 how to be served, 36.
 original summons, 36.
capias or attachment, 36.
 summons and attachment, 39.
 writ issued by court against defendant whose non joinder has been pleaded in
 abatement, 46.
 of summons to executor or administrator to prosecute or defend, 57, 59.
 officer's fees for service of writs, 91.
 service of advertisement of libel of forfeited goods, 119.
 warrant in a complaint for bastardy, 139.
 of *Warrants*. See *Arrest*.
 of *Search Warrants*, 201.
- SET-OFF**—when to be filed, 51.
 what may be filed in set-off, 52.

- SET-OFF**—demands assigned to defendant with notice to plaintiff before commencement of action may be set off, 51.
 of offsetting penal bonds, 52.
 when there are several plaintiffs or defendants, 52.
 in case of dormant partners, 52.
 when the plaintiff resides out of the state, 54. See *Actions. Judgment.*
 as to the assignment of such demand, 52.
 in an action against or by a trustee, executor, &c. what may be set off, 52, 53.
 the statement of the claim must be certain, 51.
 how set-off shall be tried, 53. See *Pleadings.*
 plaintiff may make same defence as in an action on the demands filed in set-off, 53. See judgment in set-off. See *Judgment.*
 statute limiting personal actions, applicable, 53.
 plaintiff cannot discontinue after set-off filed, without consent, 53.
 the right of set-off cut off by assignment with notice, 52.
- SHERIFF**—to serve writs and processes directed to him, unless interested, 29.
 may serve on certain corporations though interested, 29.
 the interest which disqualifies, 29.
- SHOWS**—See *Theatrical Exhibitions.*
 punishment for, without license, 228.
- SODOMY**—form of complaint, 354.
- SPENDTHRIFTS**—how punished, 168.
- SPIRITUOUS LIQUORS.** See *Intoxicating Liquors. Addendum, 383.*
- STOLEN GOODS**—receiver of, how punished, 226.
 form of complaint, 319.
- SUBPOENA**—form of, 258.
 may be issued for witnesses in all civil cases, 15.
 when to be issued for witnesses in criminal proceedings, 15.
 forms of, for defendant's witnesses, 281.
- SUMMONS AND ATTACHMENT**—form of writ of, 254.
 when proper, 28.
 service of, 39.
 how when the defendant is out of the state, 39.
 form of summons to administrators, &c. 261.
 form of, to assignee of goods in hands of trustee, 266.
- SUNDAY.** See *Lord's Day.*
- SURETIES OF THE PEACE**—by whom it may be demanded, 182.
 when may be ordered on view, without process, 184.
 how may be required, of such as go armed with a dangerous weapon, having no cause to fear an assault, violence, &c. 184.
 may be required, on complaint, &c. of those who threaten to commit an offence against the person or property of another, 183.
 have the same authority to surrender their principal, as if they were his bail in a civil action, 185. See *Bail.*
 shall be discharged, upon such surrender, from liability for subsequent acts of the principal, 185.
 complaint to be made on oath and subscribed, before a warrant shall issue, 182.
 warrant for arresting party complained of, what to recite, and precept thereof, 183.
 defendant, when brought before a magistrate, to be heard in his defence, 183.
 shall be discharged, if there be no just cause of fear, 183.
 may be required to enter into recognizance, with sureties, to keep the peace for a term not more than one year, 183.
 shall not be bound over to any court, unless he be charged with some other offence, &c. 183.
 shall be discharged, on complying with order to recognize, 183.
 shall be committed to jail, &c. if he do not recognize, 183.
 may be discharged from jail, &c. on giving the security that was required, 183, 184.
 may be ordered to pay costs of prosecution, or part thereof, and be committed till they are paid, or he be discharged, 184.

- SURETIES OF THE PEACE**—defendant may recognize anew, before any justice, when surrendered by his sureties, 185.
 may appeal from magistrate's order to next district court, on recognizing as required, 185.
 witnesses may be required to recognize to appear at appellate court, 184.
 if appeal be not prosecuted, recognizance to remain in force without affirmation of magistrate's order, and stand as security for costs, 184.
 penalty of recognizance may be remitted in part by court, if circumstances render it just, &c. 185.
 complainant may be ordered to pay costs, if his complaint be frivolous, malicious, &c. 188.
- SURETIES TO RECOGNIZANCE**—to be sufficient, 230, 240.
 if insufficient are furnished, new may be required, 241.
 how to determine sufficiency of, 241.
 married woman and minor not to be received, 241.
 an attorney may be for his client, 241.
- SURPLUSAGE**—what it is, 174.
- SUSPICION**—when a sufficient cause for receiving a complaint, 176.
 what causes of, are sufficient to justify an arrest by a private person without warrant, 189.
 must be by the person making the arrest, 190.
 an officer may arrest on the suspicion of another, 190.
- TAXATION OF COSTS**—in criminal proceedings, 247.
- TENDER**—may be pleaded to an action on a contract, subsequently brought, 54.
 of debt and costs, may be made and pleaded after action brought, 55.
 to whom such tender may be made, 54.
 in such tender the money must be brought into court to avail the defendant, 55.
 money may be brought into court without a previous tender, 55.
 a general tender is an admission of the cause of action, 55.
 what is a legal tender, 55.
 judgment for costs against plaintiff accepting a proffer of a previous tender, 72.
 how where there has been no previous tender, 72.
 how if the plaintiff recovers no more than the proffer, 72.
 of tender in trespass, 56.
- THEATRICAL EXHIBITIONS**—forms of complaints for, 367.
- TITLE TO REAL ESTATE**—when it appears to be concerned, action may be removed to D. C. at request of either party, 44.
 party requesting to recognize, 45.
 replevin, &c. may be removed when it appears that title is concerned, &c. 45.
 of the mode of making it appear that title is concerned, 45.
- TOWN COURTS**—jurisdiction of, 19, 171.
- TOWN MEETING**—warrant for calling, 278.
 form of complaint for disturbing, 325.
- TRAVEL**—of the justice, what allowed in bills of costs, 94.
 of the justice, what allowed in bills of costs, 94.
 of the parties, what allowed, 92.
 of parties, how computed, 92.
- TREASON, &c.**—forms of complaints for, 367, 368.
- TRESPASS**. See *Malicious Injury and Wilful Trespass, Title, &c.*
quare clausum, tender in, 56.
- TRIAL**—no alteration to be made in the issue after trial has begun, 60.
 party affirming to open, 60, 217.
 same party first to offer his evidence, 60, 217.
 See *Witnesses and Evidence*.
 defendant cross examines and follows plaintiff, 69, 217.
 the course of the trial to judgment, 69, 218.
 of offenders. See *Examination*.
 the course of, 217.
- TRUSTEE PROCESS**—for costs. See *Costs*. See *Scire facias*.
 form of writ, 254, 255.
 executor, &c. of deceased trustee may appear, 74.
 when adjudged trustee, 73, 74.

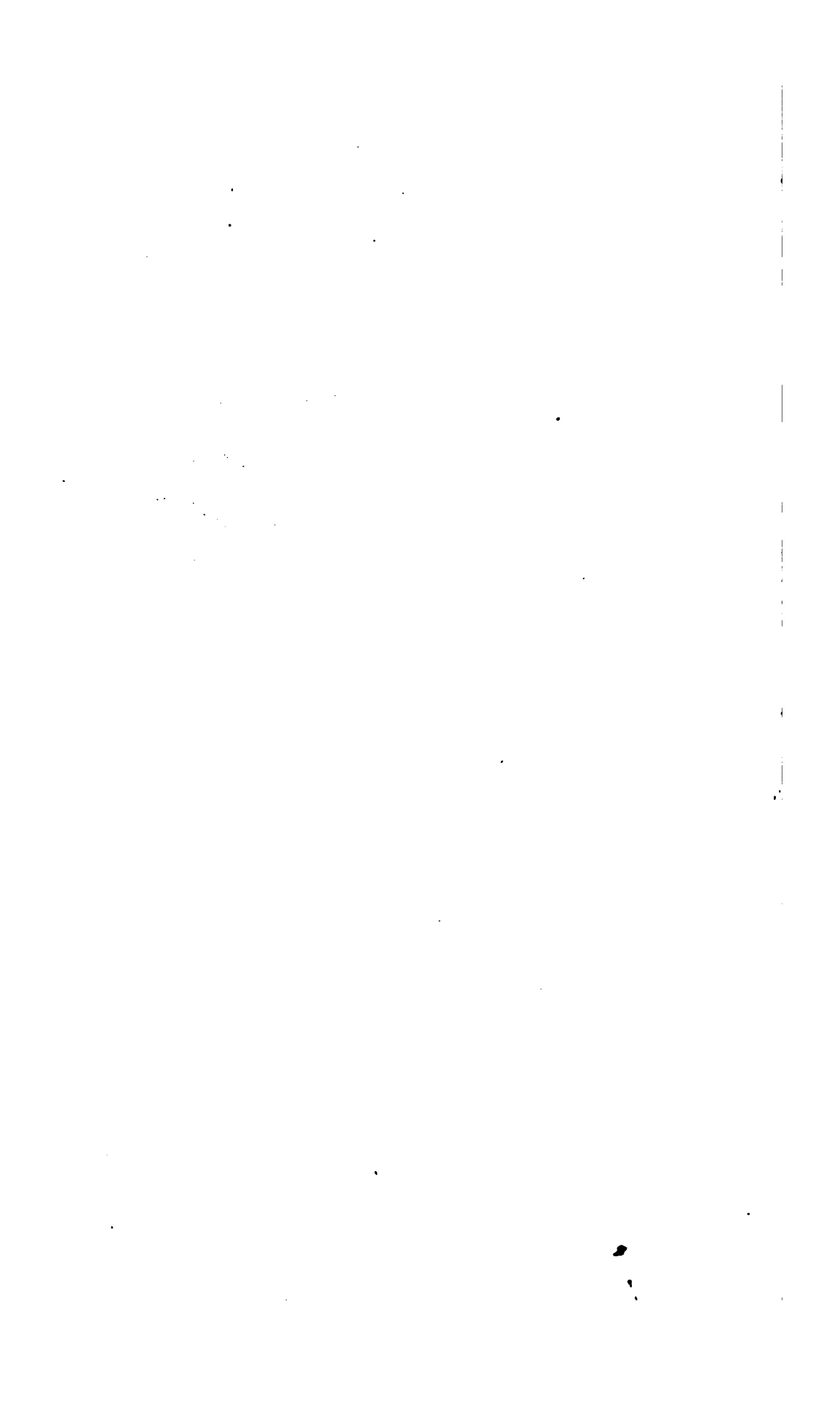
TRUSTEE PROCESS—service of the writ in, 39.

- object of, 95.
- effect of judgment, 95.
- against what principal deft. writ may run, 95.
- against what trustee, 95.
- a foreign corporation not chargeable, 95.
- of charging the trustee, 96.
- new trustees may be inserted before or after service on the principal deft, 96.
- general answer in certain cases may be signed by attorney, 108.
- interrogatories and answer in writing, 96.
- if trustee does not appear, 97.
- the statement of a trustee to be deemed true, 97, 108.
- either party may allege facts not stated or denied by the trustee, 97, 105.
- should appear by the trustee's answer that he neither states or denies, 105.
- affidavit of third person may be made part of answer, 97.
- cannot cross examine trustee, 97.
- trustee not bound to disclose statements of others, 97.
- nor to set up statute of frauds, 97.
- nor to disclose facts charging him criminally, 97.
- cannot contradict return of officer, 97.
- may file additional answers, 98.
- how when the trustee is chargeable with property other than money, 98.
- how the value of goods to be determined, 98.
- if goods are mortgaged, &c. to trustee, creditor may tender payment, 99.
- how if pledged for other than payment of money, 99.
- of the sale of such goods, 99.
- trustee may sell such goods if, &c., 99.
- when trustee is liable to an action for value of goods, 100.
- certain cases when a person shall not be adjudged a trustee, 100.
- continuance of action when defendant is summoned as trustee of the plaintiff on motion of plaintiff in trustee process, 101.
- debt need not have become payable to be attached, 101.
- one holding under a void conveyance as to creditors to be adjudged a trustee, 102.
- the trustee's right of set-off, 102.
- cannot set-off unliquidated damages, 102.
- debts and legacies due from executors and administrators subject to this process, 102.
- what are goods, effects and credits, 102.
- distinction between goods, &c. and credits, 103.
- goods to be property of deft. and in trustee's hands, 103.
- when a consignee is chargeable, 103.
- possession to be actual, 103.
- must be so as not to be reached by ordinary process, 103.
- how if the trustee claims a lien, 103.
- assignee in trust and lessee of personal property may be made trustees, 104.
- what are credits, 104.
- what the magistrate is to consider in charging a trustee with credits, 104.
- trustee has same defence as against principal, 104.
- what the debt must be, 104.
- indebtedness to one deft. charges the trustee, 104.
- general rights of trustees, 105.
- trustee not chargeable with interest after summons unless, &c. 105.
- if an assignment is disclosed, how assignee may appear, 105, 106.
- assignment may be in writing or by parole, 106.
- of facts neither stated nor denied, 105.
- of the evidence on the trial, 105.
- assignee may be summoned, when, 106.
- assignee may be made a party, 106.
- when principal defendant may be a witness, 106.
- assignee cannot be summoned after argument, 106.
- how personal property in possession of the mortgagee may be reached, 108.

- TRUSTEE PROCESS**—if assignee does not appear, plf's. attachment holds, 106.
 executor, &c. of deceased trustee may appear, 106, 107.
 feme sole trustee marrying, husband to be summoned, 107.
 in what county trustees must appear, 107.
 trustee, not liable for costs, when, 108.
 if trustee removes after judgment, execution may issue, 108.
- UNWHOLESOME PROVISIONS**—form of complaint for selling, 363.
- VAGABONDS**—and public disturbers, &c. how punished, 220.
 form of complaint against, 315.
- VIEW**—arrests may be made upon in certain cases, 165.
- VICTUALERS.** See *Innholders.*
- WALDO COUNTY**—town courts in, 171.
- WARRANT.** See *Complaint. Search Warrants.*
 when to be issued, and the precept it should contain, 178.
 the various kinds of warrants, 179.
 to issue in the name of the state, 179.
 to whom to be directed, 179.
 to follow the complaint in describing the defendant, 179.
 memorandum of to be made in docket, 179.
 service of. See *Arrest. Search Warrant.*
- WATCH AND WARD,** 155.
- WAYS**—calling meeting of proprietors of private, 17.
- WILLS**—forms for, 378.
- WITNESSES.** See *Evidence. Depositions. Oaths.*
 what witnesses are and what are not competent, 60.
parties to the record not competent, 61, except,
 members of certain corporations, 61.
 principal defendant in the trial of an alleged assignment of a demand
 against a trustee, 61.
 the supplementary oath to original entries, 61.
 parties to a suit for recovering back money lost in gaming, 62.
 the debtor in a suit to recover back usurious money, 62.
 the affidavit of parties to the loss of instruments, &c. 62.
 one defendant defaulted a witness for others in torts, 63.
 but not in contracts, 63.
interest excludes a witness, 63.
 what the interest must be, 63.
 when interested witnesses may testify, 63.
 the wife of an interested witness excluded, 64.
 persons deficient in understanding excluded, 64.
 the conviction of an infamous crime excludes, 64.
 what is an infamous crime, 64.
 public policy sometimes excludes, 64.
 an attorney cannot testify to confidential communications, 64.
 nor a wife where the husband is a party, 64.
 nor a party to a negotiable note to impeach it, 65.
 what witness once disqualified cannot be made competent, 65.
 the mode of removing the disqualification of interest, 65.
 the effect of a pardon of a witness convicted of an infamous crime, 65.
 the time when objections to incompetency should be made, 65, 66.
 how the interest of a witness may be proved, 65, 66.
 the party bound by his election as to the mode of proof, 66.
 witness need not be present when his character is impeached, 66.
 form of oath and affirmation, 66, 67.
 may be compelled to appear and testify, 69.
 must be summoned, and fees tendered, before *capias* can issue, 69.
 fees of, what allowed in bills of costs, 93.
 may be taxed though witness not summoned, 93.
 no one compelled to testify against himself in criminal process, 210.
 testimony to the signature of presidents, &c. of banks, may be dispensed with,
 when, 215, 248.

- WITNESSES**—fees of, must be certified, 98.
 affidavit of secretary of treasury U. S., &c. admissible in certain prosecutions, 215.
 when parties to the record may be witnesses in criminal proceedings, 216.
 See Credibility of Witnesses.
 in criminal cases may be ordered to recognize on appeal, 231.
 and when prisoner is bound over, 235.
 sureties may be required, 235.
 married women or minors may recognize, 236.
 shall be committed on refusal to recognize, 193, 236.
 form of commitment on refusal to testify, 232.
- WORSHIP**—Punishment for disturbing an assembly met for, 221.
 forms of complaint, 323.
- WRITS**—various kinds of, 27, 252.
 forms of writs and summons, 252.
 form of writ of restitution, 267.
 to whom may be directed, 28.
 when to be dated, 29.
 when to be made returnable, 30.
 where to be made returnable, 30.
 in case of individuals, 30.
 in case of corporations, 31.
 in penal actions, 32.
 in case of counties, 32.
 of the indorsement of, 32.
 before entry, 32.
 after entry, 33.
 the form of, 33.
 when to be taken advantage of, 33.
 who should be plaintiffs, 33.
 who should be defendants, 34.
 the declaration, 34, 49.
 no alteration to be made in, after service, 40.
 may be issued by order of court against a co-defendant whose non-joinder has been pleaded in abatement, 46.
 the effect of such a writ, 46.
 lost writ may be supplied by copy, 46.
 form of affidavit, 259.
 justice's fee for, 93.
 attorney's fee for, 91.





BS AKM JFJ
The justice of the peace :

Stanford Law Library



3 6105 044 785 736

SITY LAW LIBRARY



